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No. 99-____

IN THE

# Supreme Court of the United States

In Re: THE LESLIE FAY COMPANIES, INC.,

*Debtors.*

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD and RAYMOND J. TERWILLIGER,

*Petitioners,*

—v.—

THE LESLIE FAY COMPANIES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the Second Circuit's Summary Order deprive petitioners of appropriate appellate consideration of the issues presented for review?

2. Were petitioners' jury trial and Article III constitutional rights violated regarding their age, sex and disability discrimination claims as a result of the decisions below?

3. Should the reference of such claims to the Bankruptcy Court have been withdrawn?

4. Should disgorgement be required of all or part of the allowances for fees and expenses totaling over $13 million approved by the Bankruptcy Court to be paid to the attorneys for Leslie Fay?

5. Should those attorneys be disqualified and the decisions below vacated because of their conflicting interests?

## LIST OF PARTIES TO PROCEEDINGS BELOW

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD, and RAYMOND J. TERWILLIGER,

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IN THE

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OCTOBER TERM, 1999

**No. 99-____**

In Re: THE LESLIE FAY COMPANIES, INC.,

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JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD and RAYMOND J. TERWILLIGER,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

Petitioners Jacob V. Falbaum, Anthony Gill, Lee L. Kishbaugh, Emile Lewkowiez, Elizabeth Michaud, and Raymond J. Terwilliger, claimants-appellants in the proceedings below, respectfully petition this Honorable Court for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit dated June 29, 1999.

## OPINIONS BELOW

The non-publishable Summary Order of the United States Court of Appeals for the Second Circuit affirming the District Court is in the Appendix at 2a.[1]

The District Court's decision affirming the Bankruptcy Court is in the Appendix at 5a.

The Bankruptcy Court's decision expunging the discrimination claims of petitioners is in the Appendix at 21a and 24a.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was entered on June 29, 1999. (2a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III and the Seventh Amendment of the United States Constitution, Right to Trial by Jury, are involved in this case. (A1)

Statutory provisions include the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* ("ADEA"), Older Workers Benefit Protection Act (1990), 29 U.S.C. §§ 621 ("OWBPA"), Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101 *et seq.* ("ADA"), and the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e, *et seq.*, as well as 28 U.S.C. § 157 of the Federal Judgeship Act of 1984 (Pub. L. No. 98-353), 28 U.S.C. § 1334(c)(1), Bankruptcy Rule 2014,

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[1] The Appendix is filed as a separate document, and citations to it are followed by the suffix "a." Citations with the prefix "A" refer to the Addendum annexed hereto containing statutory and constitutional provisions. Citations with the prefix "J.A." refer to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

and 11 U.S.C. § 327 of the Bankruptcy Code. The foregoing provisions are in the Addendum annexed hereto. (A2, A5, A8, A10, A11, A12)

## STATEMENT OF THE CASE

Petitioners are former employees of The Leslie Fay Companies, Inc. ("Leslie Fay") who have claims for age, sex and disability discrimination resulting from their termination from employment. Most of the petitioners (except for Mr. Kishbaugh) were terminated in 1992. On April 5, 1993, Leslie Fay was forced to file a petition under Chapter 11 of the Bankruptcy Code. (26a) The Chapter 11 filing occurred on the heels of a scandal implicating the management of Leslie Fay in self-dealing and accounting fraud. (169a-171a)

The accounting fraud resulted in converting Leslie Fay's losses into sham profits as a result of which the top managers and their allies on the Board of Directors enriched themselves for several years with incentive compensation bonuses and lucrative stock transactions.

After the whistle was unexpectedly blown by a controller of Leslie Fay (169a), those in the top management of Leslie Fay who were the principal beneficiaries of the accounting fraud contended that they did not know what was going on under their noses. They retained a law firm with continuing relationships with Leslie Fay investors and directors who also were beneficiaries of the accounting fraud, Weil, Gotshal & Manges (174a-177a), to throw Leslie Fay into the embrace of the Bankruptcy Court under whose auspices the Company was operated for four more years under the control of the same management under whose watch the accounting fraud and their self-enrichment had occurred. (169a-172a, 183a-192a)When it emerged "reorganized" from Chapter 11 in 1997, Leslie Fay's management was still dominated by the same C.E.O.

Despite the fact that the United States Trustee took the position that the law firm under whose orchestration the reorganization proceeding was played out in the Bankruptcy Court should be disqualified for multiple conflicts of interest (177a-179a), the Bankruptcy Court declined to do so. (192a) The Bankruptcy Court nevertheless found that undisclosed and improperly conflicting interests existed and that the bankruptcy proceeding was "unusual in that it was a direct consequence of fraud that had been perpetrated against the company, its shareholders, and creditors." *In re Leslie Fay Cos., Inc.*, 175 B.R. 525, 533 (S.D.N.Y. 1994). (183a)

Meanwhile, the identity of all of the participants in the accounting fraud still remains at issue. Paul Polishan, the former chief financial officer of Leslie Fay, is scheduled to go to trial under an indictment in the United States District Court in Scranton, Pa., in October 1999. The Securities and Exchange Commission still has not issued a report following its extended investigation. See *In re the Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274 (S.D.N.Y. 1995).

Petitioners asserted repeatedly, and in a timely manner, both in the Bankruptcy Court and in the District Court, that withdrawal of the reference of their discrimination claims from the Bankruptcy Court to the District Court was required under 28 U.S.C. § 157 on the basis that such claims involved federal employment discrimination statutes enacted under the power of Congress to regulate activities affecting interstate commerce.

On appeal, the District Court also ruled that there were no reversible errors in the non-jury trial conducted in the Bankruptcy Court with respect to appellants' discrimination claims. (15a)

In addition, the District Court rejected petitioners' request for disgorgement of fees and expenses exceeding $13 million paid to Leslie Fay's attorneys because of (a) the conflicting interests of those law firms in concurrently representing the

interests of the former officers and directors of Leslie Fay and (b) the inadequacies of the disclosures to the Bankruptcy Court by the attorneys involved. (9a)

In subsequent proceedings, the Bankruptcy Court denied the claims of petitioners for age, sex and disability discrimination, despite their contention that the Bankruptcy Court was without jurisdiction to do so, and that the petitioners' jury trial rights and those under Article III of the Constitution had been violated. (31a)

On appeal, the United States Court of Appeals for the Second Circuit issued a non-publishable "Summary Order" that avoided a full scale review of the issues that had been presented. (2a)

Related discrimination cases entitled *Jacob V. Falbaum, Anthony E. Gill, Emile Lewkowiez, and Raymond J. Terwilliger v. John J. Pomerantz, Alan Golub, Laura H. Pomerantz, Herman Gordon, and B. Michael Thrope*, 94 Civ. 5503(MGC) ("*Falbaum*"), and *Lee L. Kishbaugh v. John J. Pomerantz, Alan Golub, Laura H. Pomerantz, Herman Gordon, and B. Michael Thrope*, 94 Civ. 7921 (MGC) ("*Kishbaugh*"), asserting claims against individual defendants but not Leslie Fay were filed on July 24, 1994, and October 27, 1994, respectively. (J.A. 481-528; 657-74)

On July 24, 1995, the District Court ruled that appellants' claims against the individuals who had been officers of Leslie Fay could be maintained under the New York City Human Rights Law, but that petitioners' federal and state law discrimination claims could be maintained only against the employer, not the individuals who had been its officers. (152a) *Falbaum* and *Kishbaugh*, 891 F. Supp. 986 (S.D.N.Y. 1995).

The discriminatory mentality prevailing at Leslie Fay (J.A. 2903-06) was indicated by the testimony that Laura Pomerantz, on more than one occasion had stated in management

meetings that she wanted things to change, *wanted new faces, and 'young blood'* in the company." (J.A. 2903-06, 3122; emphasis added.)

Petitioner Raymond J. Terwilliger, formerly Leslie Fay's Vice President of Human Resources, testified that Paul Polishan had put together "hit lists" of older senior management targeted for termination" to carry out Laura Pomerantz's ageist directives. (J.A. 3122; 38a)

As stated above, Paul Polishan, the former Chief Financial Officer is presently under an indictment for criminal conspiracy involving accounting fraud with an imminent trial in the United States District Court for the Middle District of Pennsylvania. (J.A. 2213-63)

The indictment charges that Polishan directed the manipulation of the books and records kept by Leslie Fay in order to inflate the price of its stock and earnings, thereby currying favor with his superiors at Leslie Fay (J.A. 2229 ¶ 36), and leading to the overstatement of Leslie Fay's pre-tax income by in excess of $75,000,000 in the two and a half year period shortly before the company was forced to file a Chapter 11 petition. (J.A. 2222-26)

Terwilliger also identified Polishan as extensively involved in discriminatory conduct violative of the rights of the employees. (J.A. 2907-08)

The fraudulent manipulation of the Reduction in Force list by Polishan and his cohorts, at the insistence of Laura Pomerantz in her continuing quest for "new faces, and "young blood' " (J.A. 3122), as Terwilliger testified, is indicative of the same pattern or practice of fraudulent conduct by Leslie Fay that has resulted in Polishan's indictment for manipulation of financial records. (J.A. 2229)

The mendacity of Leslie Fay's management involving its Human Resources practices was made clear in its deliberate violation of the overtime pay requirements of the Fair Labor

Standards Act was admitted by Mr. Vallecorse, another former Vice President of Human Resources (J.A. 5920-21), and also in its the deliberate violation of the liquidated damage provisions of the collective bargaining agreement. (J.A. 5926)

> "I was always amazed that the company would make an agreement with the union and not think twice about violating it, and I brought that to the attention of a number of people that I found it—I found it unusual that you would make an agreement and not try to live by it, and that comment that you mentioned, Don't worry about it, it's not a big deal was—was told to me."

Roger Vallecorse, the former Human Resources Vice President, who was not a party in the litigation, characterized Leslie Fay's management as a "den of vipers" (J.A. 5929-31):

> "Q. Did you ever refer to the management of Leslie Fay as being a den of vipers?
>
> "A. I viewed it as a very difficult place to work, and I referred to them as viper-like, yes."
>
> * * * * *
>
> "A. . . . yes, I used that term."

## REASONS FOR GRANTING THE PETITION

### I. AN IMPORTANT ISSUE IS PRESENTED THAT WARRANTS RESOLUTION

In light of the important constitutional and statutory questions presented by the appeal to the Second Circuit, including those of first impression, it is submitted that the cursory Summary Order written by a "Deputy Clerk" for its "Acting Clerk" does not present an appropriate discharge of petitioners' rights to appellate review. (4a)

Whether judges have appropriately performed the function that they been appointed to perform by the President, by and with the consent of the Senate, or instead have subdelegated their responsibilities to clerks lacking such credentials is manifestly an important issue since it is only judges who are vested with "the judicial power" that is conferred under Article III, Section 1 of the Constitution. (A1)

On the basis of a quotation taken out of context from *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323 (2d Cir. 1993), the Second Circuit's Summary Order concludes that the Bankruptcy Court had jurisdiction to adjudicate petitioners' discrimination claims without a jury "Because the creditors in this case filed proofs of claims with the bankruptcy court seeking direct allowances against the debtor's estate." (3a).

Ignored was the fact that the lawsuit involved in *Germain*, by a bankruptcy *trustee*, and was not remotely like the employment discrimination claims brought by former employees here involved. As a matter of law the petitioners had no choice but to file proofs of claims with the bankruptcy court in order to avoid forfeiting them since (1) under the applicable federal discrimination statutes, such claims may be asserted only against an "employer," see *Jacob V. Falbaum et al. v. John J. Pomerantz et al.*, 891 F. Supp. 986 (S.D.N.Y. 1995), and (2) their former "employer" had taken matters out of their hands by itself had petitioning the Bankruptcy Court for "protection" from the consequences of the accounting fraud for which Leslie Fay's top officers and directors were responsible.

The former employees would have been left without a remedy against their former employer unless they proceeded to file their proofs of claims in the Bankruptcy Court promptly after receiving a "right to sue" letter from the Equal Employment Opportunity Commission with regard to the discrimination charges required to be filed with it.

This situation was not involved in the *Germain* case relied upon by the Second Circuit's Summary Order. *Germain* also differs in that it involved post-petition claims (988 F.2d at 1325), whereas five of the six claims involved in this litigation were the outgrowth of pre-petition claims.

The Second Circuit's Summary Order also overlooks the applicability of this Court's very pointed statement in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 545-46 (1990), which also involved a claim of employment discrimination:

> "Although our holding requires a new trial in this case, we view such litigation as essential to vindicating Lytle's Seventh Amendment rights. The relitigation of factual issues before a jury is no more "needless" in this context than in cases in which a trial court erroneously concludes that a claim is equitable rather than legal, see *e.g.*, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), or that resolution of an equitable claim can precede resolution of a legal claim, see, *e.g.*, *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). In all of these circumstances, relitigation is the only mechanism that can completely correct the error of the court below. Thus, concern about judicial economy, to the extent that it supports respondent's position, remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial."

The issues presented by this petition are of first impression. Since they involve the interaction of federal discrimination laws in which the right to jury trial is guaranteed by statute, as well as the Seventh Amendment, and the procedures of bankruptcy courts, which are Article I courts in which such jury trials cannot be constitutionally conducted, see *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76 (1982), makes highly desirable the resolution of such issues on a nation-wide basis in order to harmonize the conflicting decisions that exist on the subject. See *In re White*

*Motor Car Corp.*, 42 B.R. 693 (N.D. Ohio 1984); *In re Hughes-Bechtol, Inc.*, 141 B.R. 946 (Bankr. S.D. Ohio 1992); *In re Weinberg*, 153 B.R. 286 (Bankr. D.S.D. 1993).

Apart from the District Court below, the only lower court decision declining to withdraw the reference to the Bankruptcy Court in such a case appears to be *Wittes v. Interco Inc.*, 137 B.R. 328, 329 n.1 (E.D. Mo. 1992), which acknowledged that it was refusing to follow the contrary decisions of *In re Bennett Paper Corp.*, 63 B.R. 8 (Bankr. E.D. Mo. 1985), and *In re Cache, Inc.*, 71 B.R. 851 (Bankr. S.D. Fla. 1987).[2]

*Bennett Paper, supra*, states that "While under 28 U.S.C. § 157 (b)(2)(B) the allowance or disallowance of a claim is a core proceeding which this Court may hear and determine, that section must be read with 28 U.S.C. § 157(d)," and then concluded that "Given that ADEA is a law of the United States regulating organizations or activities affecting interstate commerce and the Debtor admits that it is an organization within the purview of ADEA, it follows that [a motion by the EEOC to withdraw the reference] would have to be granted." 63 B.R. at 12.

Insofar as we are able to decipher the obscurity of the Summary Order below, it appears to be premised on the view that, because the jurisdiction of the Bankruptcy Court is equitable in nature, there was no right to a jury trial of the discrimination claims. (3a)

The fallacy in such a view, however, is shown by the statutory language of the ADEA itself, under which it is made clear that Congress specifically intended for the right to a

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[2] The decision in *Wittes* is not applicable for the further reason that the papers before the court did not indicate that a demand for a jury trial had been made, *Wittes*, 137 B.R. at 329 n.2. and a district court decision (137 B.R. at 329), was relied upon that was subsequently reversed in *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 995 (2d Cir. 1990).

trial by jury nevertheless to be available in the litigation of such a claim.

The ADEA provides that such claims are to be litigated in Article III constitutional courts ("a court of competent jurisdiction"), rather than bankruptcy courts, and that "a person *shall be entitled to a trial by jury* of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, *regardless of whether equitable relief is sought by any party in such action.*" 29 U.S.C. § 626(c)(2) (emphasis added).

The premise that petitioners waived their jury trial rights by filing proofs of claims in the Bankruptcy Court (3a) also is refuted by *Germain v. Connecticut National Bank*, 988 F.2d 1323 (2d Cir. 1993), which states, "We conclude that neither precedent nor logic supports the proposition that either the creditor or the debtor automatically waives all right to a jury trial whenever a proof of claim is filed." 988 F.2d at 1330.

After Leslie Fay filed its Chapter 11 petition, as a consequence of "calamitous" consequences of the accounting fraud perpetrated by member of its management (170a), petitioners had no choice but to follow suit and file their proofs of claims in the Bankruptcy Court when they did, in light of the bar date imposed by the Bankruptcy Court's Order, in order to assert their discrimination claims against their former employer. It follows that, in doing what was done in order to protect the survival of their claims in the only way possible, neither the petitioners nor their lawyer waived their jury trial rights. (SSA 1-3)[3]

The filing of the proofs of claim by petitioners was not a "voluntary" action for two reasons. First, because all claims against Leslie Fay other than those filed in the Bankruptcy Court were subject to an automatic stay under the Bankruptcy

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[3] Citations preceded by the prefix "SSA" refer to the Second Supplemental Appendix filed with the United States Court of Appeals for the Second Circuit.

Code, they could not be separately litigated against petitioners' former employer. (11 U.S.C. § 362(a)(1), (6).) Violation of the automatic stay by the commencement of separate judicial proceedings therefore would have exposed petitioners to damages for contempt under 11 U.S.C. § 362(h). *See* 3 *Collier on Bankruptcy* (15th ed. ) ¶362.11[2].

Second, because the Bankruptcy Court had imposed what is known as a "bar date" or "bar order" as an outgrowth of Leslie Fay's voluntary action of filing a Chapter 11 petition for reorganization. (SSA 1-3) Under Bankruptcy Procedure Rule 3003(c)(3), the Bankruptcy Court is required to "*fix . . . the time within which proofs of claim or interest may be filed.*" (Emphasis added.)

The bar date involved in this case provided (SSA 2):

> ". . . IF YOU ARE REQUIRED TO FILE A PROOF OF CLAIM AND FAIL TO DO SO IN THE MANNER PRESCRIBED ABOVE, YOU WILL BE FOREVER BARRED FROM VOTING UPON, OR RECEIVING A DISTRIBUTION UNDER, ANY PLAN OR PLANS OF REORGANIZATION FOR ANY OF THE DEBTORS *AND WILL BE FOREVER BARRED FROM ASSERTING ANY SUCH CLAIM AGAINST ANY OF THE DEBTORS OR THEIR SUCCESSORS OR ASSIGNS . . . .*" (Emphasis added.)

Petitioners' filing of such proofs of claims against Leslie Fay, their former employer, therefore, was a necessity, not a voluntary or optional act. This is made clear in Rule 3003(c)(2) of the Rules of Bankruptcy Procedure which requires a creditor to "file a proof of claim or interest within the time prescribed by subdivision (c)(3) . . . ."

If petitioners had *not* filed their proofs of claim, waiver of their claims would have occurred. 9 *Collier on Bankruptcy* (15th ed.) ¶3003.03. *See Pioneer Invest. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993)

(discussing the effect of such a bar date, and risk of non-compliance). Thus the filing of a proof of claim is mandated to *avoid* a waiver. Such action therefore should not be construed as having been intended to result in the very thing it sought to avoid, *i.e.*, a waiver of rights.

The filing of a proof of claim is not a waiver of jury trial rights for the further reason that such action is presumptively done with knowledge of the existence of the right of withdrawal granted by 28 U.S.C. § 157(d). In other words, there would be nothing to withdraw unless the debtor had triggered the request by giving notice that it intended to contest the proof of claim that had already been filed. As stated in *In re Nibsco Supply, Inc.*, Nos. 96-CV-0741E, 96-CV-0742E, 1997 U.S. Dist. LEXIS 7953, at ** 4-6 (W.D.N.Y. 1997):

> "The statutory language requires, as a threshold matter, that there be a proceeding—a contested matter between a debtor and a creditor—in the bankruptcy court to be withdrawn. *In re E & S Facilities, Inc.*, 181 B.R. 369, 371 (S.D.Ind. 1995), affd. sub nom., *Matter of Vicars Ins. Agency Inc.*, 96 F.3d 949 (7th Cir. 1996).
>
> * * * * *
>
> "In this case AGCO has not yet filed a proof of claim
>
> . . . and has instead elected to attempt to avoid subjecting itself to the bankruptcy court's equitable jurisdiction and thereby preserve any Seventh Amendment right to a jury trial it may have. *Langenkamp v. Culp*, 498 U.S. 42, 44-45, 112 L. Ed. 2d 343, 111 S. Ct. 330 (1990) (per curiam). Yet, until AGCO files a proof of claim, it does not invoke such court's jurisdiction to resolve a dispute that may exist regarding its claim or claims so that it may share in the distribution of the bankruptcy estate. *In re Hooker Investments*, Inc., 937 F.2d 833, 835, 838 (2nd Cir. 1991). *Until AGCO submits a proof of claim and an objection to such is filed or an*

> *adversary proceeding is otherwise commenced, there is no pertinent contested matter in the bankruptcy court to be withdrawn. In re Chateaugay Corp.*, at 625-626; see also BR 7001, Advisory Committee Note (request for relief from automatic stay does not commence an adversary proceeding)." (Emphasis added.)

Similarly, it is well established that a personal injury claim initiated in the Bankruptcy Court by filing a proof of claim is nevertheless subject to mandatory withdrawal under 28 U.S.C. § 157 (b)(5) because jury trial rights are intended to be preserved in such proceedings whether or not they involve what is otherwise considered a "core proceeding." *See In re Patterson*, 150 B.R. 367 (E.D.Va. 1993); *In re Hansen*, 164 B.R. 482 (D.N.J. 1994).

## II. APPLICATION OF 28 U.S.C § 157 TO DISCRIMINATION CASES RAISES AN IMPORTANT ISSUE OF FIRST IMPRESSION

Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Pub. L. No. 98-353), in response to *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which held that the broad grant of jurisdiction to the newly formed bankruptcy courts created by the Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598), was invalid since they are not courts established under Article III of the Constitution. *See In re Vicars Ins. Agency*, 96 F.3d 949, 951 (7th Cir. 1996).

The 1984 Act included 28 U.S.C. § 157(d), which provides:

> The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. *The district court shall*, on timely motion of a party, *so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration*

*of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce*. (Emphasis added.)

The Second Circuit's Summary Order limits itself to Second Circuit decisions; no reference is made to any decisions of this Court or other appellate courts. It assumes that mandatory withdrawal of the reference to the Bankruptcy Court was not required under 28 U.S.C. § 157(d) on the basis that only a "simple reference" to the federal non-discrimination statutes was involved.

By the application of the jury trial mandate found in the Age Discrimination in Employment Act at 29 U.S.C. § 626 (c),[4] not to involve a "significant interpretation" of federal laws (A4), the Summary Order also ignores the constitutional dimensions of the issue, particularly in light of the requirements of the Seventh Amendment.

In addition, the plain language of 28 U.S.C. § 157(d), which does not use the phrase "significant interpretation," but only refers to "requires consideration" of other laws affecting interstate commerce along with bankruptcy laws as the condition required to trigger mandatory withdrawal. (A19-A20)

Relegated to the dustbin of insignificance by the Second Circuit's Summary Order is the unmentioned *Northern Pipeline* case, 458 U.S. 50 (1982), holding that such issues may be tried only in federal courts created under Article III of the Constitution, and not in Article I bankruptcy courts.

28 U.S.C. § 157(d) was enacted in 1984 for the purpose of protecting and preserving in Article III courts the jury trial rights of litigants such as petitioners herein. Evidence of such legislative intent is shown by the following statement of

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[4] ". . . a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action."

Congressman Kastenmeier (130 Cong. Rec. H1850, daily ed., March 21, 1984):

> ["Activities affecting interstate commerce"] would, for example, mean related causes which may require consideration of both title 11 [of the Bankruptcy Code] and other Federal laws including cases involving the National Labor Relations Act, *civil rights laws . . . and similar laws.* (Emphasis added.)

Also, unmentioned as seemingly insignificant in the Second Circuit's Summary Order is *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 118 S.Ct. 838, 842 (1998), regarding the protections of the Older Workers Benefit Protection Act, 29 U.S.C. §§ 621, 626(f)(1), as a case that is applicable to releases of the kind obtained by Leslie Fay from petitioners Falbaum, Gill, Kishbaugh and Terwilliger having age discrimination claims when confronted with the pretext of "downsizing," and nevertheless considered by the Bankruptcy Court in deciding their claims notwithstanding the directly contrary provisions of 28 U.S.C. § 157(d). (140a-147a)

In addition, in the Bankruptcy Court petitioners also sought withdrawal under 28 U.S.C. § 157(b)(5) in connection with their Motion for Order Withdrawing Reference dated April 21, 1995, filed in the Bankruptcy Court (SSA 277-78), Reply Affidavit (J.A. 729-31) and Memorandum of Law dated May 30, 1995. (SSA 266-68)

Petitioners' Memorandum of Law dated April 21, 1995, cites *In re Boyer*, 93 B.R. 313, 317-18 (N.D.N.Y. 1988) at SSA 277-78, which holds that civil rights actions under 42 U.S.C. §§ 1983 and 1985 encompass personal injury tort claims that cannot be determined in the Bankruptcy Court. Their subsequent Memorandum of Law to the Bankruptcy Court dated May 30, 1995 includes an entire section under the heading: "WITHDRAWAL ALSO IS REQUIRED BECAUSE OF THE "PERSONAL INJURY" NATURE OF THE

CLAIMS." (SSA 266) Their brief to the District Court dated August 1, 1996, also includes a discussion of the same point at pp. 13-14. However, the District Court erred in concluding that the issue had not been raised by the petitioners, and the Summary Order of the Second Circuit ignored the issue.

## III. DISQUALIFICATION AND DISGORGEMENT SHOULD HAVE MERITED INTENSIVE REVIEW

The compound conflicts of interests of the law firms that were involved in the proceedings in the Bankruptcy Court merited but did not receive intensive review in light of (a) the importance of such issues in the proper administration of justice, and (b) the conflict in the decisions below with those in other Circuits.

Bankruptcy Procedure Rule 2014(a) provides that professionals seeking employment as attorneys shall set forth all of the professional "connections" with the debtor, creditors, any other party in interest, the United States Trustee or any employee in the office of the United States Trustee.

Bankruptcy Rule 2014 permits no discretion on the part of the professional: all connections *must* be disclosed. Only complete disclosure at the time the professional seeks approval of employment affords the court the ability to determine whether the professional meets the test of disinterestedness. Thus, "[f]ailure to comply with the disclosure requirements of Rule 2014(a) is, by itself, enough to disqualify an attorney and deny compensation." *In re Granite Sheet Metal Works, Inc.*, 159 B.R. 840, 847 (Bankr. S.D. Ill. 1993) (citing *Black Hills Greyhound Racing Ass'n*, 154 B.R. 285, 294 (Bankr. D.S.D. 1993); *In re Nat'l Distrib. Warehouse Co., Inc.*, 148 B.R. 558, 562 (Bankr. E.D. Ark. 1992); *In re Tinley Plaza Assocs., L.P.*, 142 B.R. 272, 278 (Bankr. N.D. Ill. 1992)).

Although the Bankruptcy Court declined to adopt the disqualification of the United States Trustee, in a decision dated December 15, 1994 (A 1295-1325), *In re Leslie Fay Cos., Inc.*, 175 B.R. 525 (Bankr. S.D.N.Y. 1994), Leslie Fay's counsel was not absolved of misconduct. (169a-179a)

On the contrary, the Bankruptcy Court specifically found that there had been substantial misconduct by Leslie Fay's counsel. The Bankruptcy Court found that Leslie Fay's counsel was not "disinterested" as required by 11 U.S.C. § 327(a). In addition, the Bankruptcy Court found that Leslie Fay's counsel had failed to file full and complete disclosure as required by Rule 2014 (J.A. 1312-1321). The omission of key information required to be disclosed both to the Bankruptcy Court and to the United States Trustee by Leslie Fay's counsel was found by the Bankruptcy Court to be "simply inexcusable." (187a)

What was found to be "simply inexcusable" the Bankruptcy Court paradoxically thereafter proceeded to excuse by authorizing payments of totaling over $13 million to them.

Moreover, at the time neither the United States Trustee nor the Bankruptcy Court could have been aware of the additional conflicting interests and non-disclosures affecting Leslie Fay's counsel that were to occur in their manipulation of the proceedings in the Bankruptcy Court in their malicious prosecution of the petitioners in the Adversary Proceeding initiated by Leslie Fay's attorneys in the Bankruptcy Court to punish and intimidate the petitioners, and other proceedings that Leslie Fay's attorneys insisted on being conducted in the Bankruptcy Court in order to obstruct petitioners' jury trial rights.

The manipulation of the affairs of a bankruptcy proceeding in the interests of corporate insiders has long been prohibited. *See Pepper v. Litton*, 308 U.S. 295, 312 (1939). Since that scenario is precisely what is shown by the time records of Leslie Fay's multiple counsel in the Bankruptcy Court, as

well as in the findings of the United States Trustee (J.A. 251-274), the effect has been to have irreparably tainted the determinations below. For that reason, they should be reversed and vacated in accordance with *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990).

Complete disclosure by attorneys is essential for the bankruptcy court to make a considered, reasoned determination on applications for employment. Thus, any fact which might have bearing on the question of the attorney's disinterestedness or the attorney's representation of an adverse interest must be disclosed. *See In re Rusty Jones, Inc.*, 134 B.R. 321, 345 (Bankr. N.D. Ill. 1991); *see also In re Granite Partners, L.P.*, 219 B.R. 22 (Bankr. S.D.N.Y. 1998).

The issue of attorneys' non-disclosure of conflicts in applications for employment was addressed in *In re H. L. Stratton, Inc.*, 51 F.2d 984 (2d Cir. 1931), *cert. denied*, 284 U.S. 682 (1932), which upheld a decision which denied fees and ordered repayment of fees previously paid.

*In re Arlan's Dep't Stores Inc.*, 615 F.2d 925 (2d Cir. 1979), fees to two law firms were denied and the return of fees and disbursements were ordered returned along with interest on the amounts previously paid, because of the attorneys' failure to disclose one firm's fee-sharing arrangement with the non-bankruptcy general counsel for the debtor and payments of fees to both firms without court authorization. *See also In re Futuronics*, 655 F.2d 463, 468-69 (2d Cir. 1981), *cert. denied*, 455 U.S. 941 (1982) ("It has long been the practice in this Circuit to deny compensation to counsel who fail to comply with the disclosure provision").

Bankruptcy Rule 2014(a) leaves an attorney seeking employment with no discretion to choose what connections are relevant or trivial to a Section 327(a) analysis. *See In re Rusty Jones*, 134 B.R. 321 at 345 (Bankr. N.D.Ill. 1991) ("the decision about what to disclose is not left to the prospective attorney whose judgment may be clouded . . . there is no

merit to the [law firm's] argument that it did not have to disclose its connections . . . because its attorneys did not feel that a conflict existed.").

Bankruptcy Code Section 327 requires that a professional be disinterested. The bankruptcy court in *In re Crivello*, 194 B.R. 463 (Bankr. E.D. Wis. 1996) construed the Bankruptcy Code's definition of "disinterested person" under section 101(14) as being "expansive enough to encompass anyone who may have an interest in or relationships with the debtor, tending to color the objective and impartial perspective required of attorneys." *Crivello*, 194 B.R. at 465 (citations omitted). "[A] 'disinterested person should be divested of any scintilla of personal interest which might be reflected in his decision concerning estate matters.' " *Id.* (quoting *In re Martin* 817 F.2d 175, 181 (1st Cir. 1987). The repeated assertions that the representation of the individual senior officers and directors of Leslie Fay by its counsel as persons subject to individual liability in other proceedings directly related to the litigation of petitioners' claims did not conflict with their representation of Leslie Fay as a corporate entity raise very important issues that need to be reviewed to insure the integrity of proceedings conducted in the Bankruptcy Courts.

The quarterback calling the plays involved in the conflict-impacted proceedings in the Bankruptcy Court was the law firm that acted as lead counsel for Leslie Fay, Weil, Gotshal, & Manges. That law firm's violation of the requirements of Bankruptcy Rule 2014 and related provisions from the beginning and throughout the Chapter 11 proceeding are well established, as the United States Trustee found in making a motion for the firm's disqualification (J.A. Mem.L. 10/19/94, p.10):

> "As the Debtors' counsel, Weil Gotshal was required to maximize the estates in order to provide the greatest recovery for creditors' claims. As the attorney for the Audit Committee, Weil Gotshal investigated the Debtors' officers and directors, including Mr. Tarnopol and Mr.

> Friedman. Weil Gotshal's representation of Bear Sterns [sic] and Odyssey—while concurrently investigating Mr. Tarnopol and Mr. Friedman—caused it to have an interest adverse to the estates which rendered it not disinterested under section 101(14)(E).

"Given the stature of Messrs. Friedman and Tarnopol within the corporate structure of Weil Gotshal's clients, Weil Gotshal's ties to Baer Stearns and Odyssey created, on the date the firm was retained, the appearance of an incentive not to pursue potential claims against those directors with the utmost vigor. As a result of these divided loyalties, Weil Gotshal was not disinterested when it sought to be retained as the Debtors' counsel."

The fruit of the poison tree in the circumstances of this proceeding, however, also turned out to be evident, as shown by the conflicts of interest not only of WG&M but also of the other law firms which that firm picked to represent the Leslie Fay, including MW&E and PCF&K whose real interests at all times were primarily subservient to the individuals who were the principals in the management and control of Leslie Fay. The fees received by these law firms therefore should be disgorged. Since these firms were not properly retained and, in addition, were affected by their conflicting interests in the manner in which they performed their services, they cannot be compensated for their improper, conflict-impacted representation of Leslie Fay. *See In re Federated Dep't. Stores, Inc.*, 44 F.3d 1310, 1319-20 (6th Cir. 1995) (holding that a valid appointment under § 327 is a condition precedent to receiving compensation under § 330; where a professional is later found not to have been disinterested at the time of appointment, there cannot have been a valid appointment under § 327 and compensation must be denied); *In re Grabill Corp.*, 983 F.2d 773, 777 (7th Cir. 1993) ("The scattered cases . . . that allow a lawyer to be compensated who, lacking the requisite disinterest, could not have been appointed seem to us just plain

wrong."); *see also In re Envirodyne Inds. Inc.*, 150 B.R. 1008, 1021 (Bankr. N.D. Ill. 1993) ("Failure to abide by the disclosure requirements is enough to disqualify a professional and deny compensation, regardless of whether the undisclosed connections were material or *de minimis*.").

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# ADDENDUM

## Constitutional and Statutory Provisions Involved

United States Constitution, Article III, Section 2:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; * * *"

United States Constitution, Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

28 U.S.C. § 46. Assignment of judges; panels; hearings; quorum

> (a) Circuit judges shall sit on the court and its panels in such order and at such times as the courts directs.
>
> (b) In each circuit the court may authorize the hearing and determination of cases and controversies by separate panels, each consisting of three judges, at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified, or unless the chief judge of that court certifies that there is an emergency including, but not limited to, the unavailability of a judge of the court because of illness. Such panels shall sit at the times and places and hear the cases and controversies assigned as the court directs. The United States Court of Appeals for the Federal Circuit shall determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the judges sit on a representative cross section of the cases heard and, notwithstanding the first sentences of this subsection, may determine by rule the number of judges, not less than three, who constitute a panel.

(c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges (except that the United States Court of Appeals for the Federal Circuit may sit in panels of more than three judges if its rules so provide), unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court in banc shall consist of all circuit judges as may be prescribed in accordance with section 6 of Public Law 95-486 (92 Stat. 1633), except that any senior circuit judges of the circuit shall be eligible (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc reviewing a decision of a panel of which such judge was a member, or (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judges was in regular active service.

Pertinent Portions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*:

29 U.S.C. § 621. Congressional statement of findings and purpose:

"(a) The Congress hereby finds and declares that—

(1) in the fact of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill,

morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of foods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 626 (b):

"The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this sec-

tion, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

29 U.S.C. § 626(c)(1):

"Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter."

29 U.S.C. § 626(c)(2):

"In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

29 U.S.C. § 626(d):

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the indi-

vidual notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

29 U.S.C. § 626(e):

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

Older Workers Benefit Protection Act ("OWBPA"):
29 U.S.C. § 626(f):

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to—

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum—

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of any employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

29 U.S.C. § 633a(c):

Any persons aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act.

Civil Rights Act of 1964, Title VII, 42 U.S.C. §§ 2000e *et seq.*:

42 U.S.C. § 2000e-5(f)(3):

> Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

42 U.S.C. § 2000e-5(g):

> (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organizations, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with rea-

sonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates the respondent would have taken the same action in the absence of the impermissible moving factor, the court—

> (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and
>
> (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

42 U.S.C. § 12101(b)(4):

(b) Purpose

It is the purpose of this chapter—

> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to

address the major areas of discrimination faced day-to-day by people with disabilities.

11 U.S.C. § 1107(a). Rights, powers, and duties of debtor in possession:

> Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

11 U.S.C. § 328. Limitation on compensation of professional persons:

> (a) The trustee, or a committee appointed under section 1102 of this title, with the court's approval, may employ or authorize the employment of a professional person under section 327 or 1103 of this title, as the case may be, on any reasonable terms and conditions of employment, including on a retainer, on an hourly basis, or on a contingent fee basis. Notwithstanding such terms and conditions, the court may allow compensation different from the compensation provided under such terms and conditions after the conclusion of such employment, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions.
>
> (b) If the court has authorized a trustee to serve as an attorney or accountant for the estate under section 327(d) of this title, the court may allow compensation for the trustee's services as such attorney

or accountant only to the extent that the trustee performed services as attorney or accountant for the estate and not for performance of any of the trustee's duties that are generally performed by a trustee without the assistance of an attorney or accountant for the estate.

(c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 U.S.C. § 327. Employment of professional persons:

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

(d) The court may authorize the trustee to act as attorney or accountant for the estate if such authorization is in the best interest of the estate.

(e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

(f) The trustee may not employ a person that has served as an examiner in the case.

Bankruptcy Rule of Procedure 2014(a):

Employment of Professional Persons:

(a) *Application for and Order of Employment.* An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts

> showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

Bankruptcy Rule of Procedure 2016:

Compensation for Services Rendered and Reimbursement of Expenses:

> (a) *Application for Compensation or Reimbursement.* An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation

received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) *Disclosure of Compensation Paid or Promised to an Attorney for Debtor.* Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

18 U.S.C. § 152. Concealment of assets; false oaths and claims; bribery:

A person who—

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or property, renumeration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a

case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provision of title 11; knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor;

shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S.C. § 155. Fee agreements in cases under title 11 and receiverships:

Whoever, being a party in interest, whether as a debtor, creditor, receiver, trustee or representative of any of them, or attorney for any such party in interest, in any receivership or case under title 11 in any United States court or under its supervision, knowingly and fraudulently enters into any agreement, express or implied, with another such party in interest or attorney for another such party in interest, for the purpose of fixing the fees or other compensation to be paid to any party in interest or to any attorney for any party in interest for services rendered in connection therewith, from the assets of

the estate, shall be fined under this title or imprisoned not more than one year, or both.

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from the property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmation of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and

other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 158. Appeals:

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) If authorized by the Judicial Conference of the United States, the judicial council of 2 or more circuits may establish a joint bankruptcy appellate panel comprised of bankruptcy judges from the districts within the circuits for which such panel is established, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(3) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(4) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is

appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeal from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

Supreme Court, U.S.
FILED

No. 99-____ (2)

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OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

In Re: THE LESLIE FAY COMPANIES, INC.,

*Debtors.*

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD and RAYMOND J. TERWILLIGER,

*Petitioners,*

—v.—

THE LESLIE FAY COMPANIES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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98-5051
Filed Jun 29, 1999
Issued as Mandate: Aug 24, 1999

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SUMMARY ORDER

This summary order will not be published in the Federal Reporter and may not be cited as precedential authority to this or any other court, but may be called to the attention of this or any other court in a subsequent stage of this case, in a related case, or in any case for purposes of collateral estoppel or res judicata.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 29 day of June, one thousand nine hundred and ninety-nine.

PRESENT:

HON. PIERRE N. LEVAL,
HON. SONIA SOTOMAYOR,
*Circuit Judges*,

HON. MILTON POLLACK,*
*Senior District Judge*.

---

* The Honorable Milton Pollack of the United States District Court for the Southern District of New York, sitting by designation.

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD AND RAYMOND J. TERWILLIGER,

*Creditors-Appellants*,

—v.—

THE LESLIE FAY COMPANIES, INC.,

*Debtors-Appellees*.

---

*Appearing for Creditors-Appellants*: Arthur M. Wisehart, Wisehart & Koch, New York, NY.

*Appearing for Debtors-Appellees*: Joel E. Cohen, McDermott, Will & Emery, New York, NY, Alan B. Miller, Weil, Gotshal & Manges LLP, New York, NY.

UPON DUE CONSIDERATION of this appeal from a judgment of the United States District Court for the Southern District of New York (Jed S. Rakoff, *Judge*), it is hereby

ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

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The creditors appeal from that portion of the district court's judgment that affirmed a bankruptcy court decision expunging their federal antidiscrimination claims and awarding fees and expenses. We affirm for substantially the same reasons stated by the district court.

The creditors' principal argument on appeal is that the bankruptcy court erred by exercising jurisdiction over the creditors' claims. It is, however, settled law " that the determinative factor as to [a] bankruptcy court's jurisdiction . . . is that the [objecting party] filed a proof of claim resulting in

an adversary proceeding that involved the 'allowance or disallowance of claims against the estate.' " *In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 705 (2d Cir. 1995) (quoting 28 U.S.C. § 157(b)(2)(B)). By filing a proof of claim, a creditor also "forsakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim . . . ." *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323, 1329 (2d Cir. 1993). Because the creditors in this case filed proofs of claims with the bankruptcy court seeking direct allowances against the debtor's estate, the bankruptcy court had the jurisdiction to adjudicate these claims without a jury.

Nor are we persuaded that mandatory withdrawal was appropriate under 28 U.S.C. § 157(d), which is reserved for cases requiring "significant interpretation, as opposed to simple application of federal laws apart from the bankruptcy statutes." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1026 (2d Cir. 1991); *see also In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 995 (2d Cir. 1990) ("Withdrawal under 28 U.S.C. § 157(d). . . is reserved for cases where substantial and material consideration of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceedings."). Only one of the creditors' claims even arguably required the significant interpretation of non-Bankruptcy Code federal statutes. In particular, the bankruptcy court was required to decide a then-unsettled issue when adjudicating Kishbaugh's claims as to whether releases that were otherwise unenforceable could be ratified by a releasor's failure to tender back the consideration given for the release. The creditors never explicitly pointed out the difficulty of this issue, however, in its motions to withdraw or as a ground for withdrawal. Any error involved in adjudicating it was, moreover, harmless because the issue was decided in Kishbaugh's favor.

The creditors also challenge the Bankruptcy Court's assessment of the evidence presented. We see no error in the bankruptcy judge's evaluation of the evidence, and note that when a " district court premises its findings on credibility determinations," these findings are entitled to "particularly

strong deference." *Castrol. Inc. v. Quaker State Corp.*, 977 F.2d 57, 64 (2d Cir.1992). Finally, all of the creditors' allegations of attorney conflict in the underlying bankruptcy proceedings in violation of 11 U.S.C. § 327(c) are either conclusory, unappealable or fail to allege an actual conflict. *See generally In re Arochem Corp.*, — F.3d —, 1999 WL 31142, at *9-14 (2d Cir. 1999).

We have considered all of the creditors' other arguments on this appeal and find them to be without merit. The judgment of the district court is therefore AFFIRMED.

FOR THE COURT:

KAREN GREVE MILTON, Acting Clerk

By: LUCILLE CARR
Lucille Carr, Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 8354 (JSR)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors*,

---

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD and RAYMOND J. TERWILLIGER,

*Appellants*,

—v—

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Appellees*.

---

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

On April 5, 1993, Leslie Fay and certain of its affiliates filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Each of the debtors thereafter operated its business or managed its properties as a debtor in possession pursuant to §§ 1107 and 1108 of the Bankruptcy Code. By

separate proofs of claim filed in 1993 and 1994, the appellants—former Leslie Fay employees Jacob V. Falbaum, Anthony Gill, Lee L. Kishbaugh, Emile Lewkowiez, Elizabeth Michaud, and Raymond J. Terwilliger—sought $80 million in damages from the debtors, alleging that the debtors unlawfully terminated them on the basis of age, gender, and/or disability, unlawfully failed to rehire them for similar reasons, and unlawfully retaliated against them for the exercise of their rights.

After the Honorable Miriam Goldman Cedarbaum, United States District Judge, denied appellants' motions to withdraw their claims from the Bankruptcy Court, the Honorable Tina L. Brozman, United States Bankruptcy Judge, heard and decided the claims adversely to the appellants. In blunderbuss fashion, appellants now challenge almost every aspect of those decisions. The Court finds, however, that except in one minor respect relating to one aspect of the award of fees, their appeals are without merit and must be denied.

*The Bankruptcy Court's Jurisdiction*

At the outset, appellants assert that the Bankruptcy Court lacked jurisdiction to adjudicate their claims. To the extent that these assertions constitute appeals from Judge Cedarbaum's orders, in the exercise of her original jurisdiction, denying appellants' various motions to withdraw the reference from the bankruptcy court, such appeals are beyond this Court's jurisdiction and must be addressed, if at all, to the Court of Appeals. *See* 28 U.S.C. § 158(a); *see also In re Orion Pictures Corp.*, 4 F.3d 1095, 1100 (2d Cir. 1993); *In re Sonnax Indus.*, 907 F.2d 1280, 1282-83 (2d Cir. 1990); *In re Manville Forest Products Corp.*, 896 F.2d 1384, 1385 (2d Cir. 1990); *In re Moens*, 800 F.2d 173, 176 (7th Cir. 1986); *cf. In re Manoa Finance Co., Inc.*, 781 F.2d 1370, 1372 (9th Cir. 1986). *But see In re Chateaugay Corp.*, 109 B.R. 613, 615 n.1, 619 (S.D.N.Y. 1990) (asserting—incorrectly in this Court's view—that the decision of a different district judge

that denied a motion for withdrawal of reference merged into the final order of the bankruptcy court and was reviewable under § 158(a)), *appeal dismissed on other grounds,* 924 F.2d 480 (2d Cir. 1991) (per curiam).

Appellants argue, however, that even if this Court cannot review Judge Cedarbaum's rulings, it can exercise appellate jurisdiction to review Judge Brozman's separate denial of certain of these same jurisdictional objections, which appellants separately raised in the Bankruptcy Court. This is not persuasive. Appellants, having chosen to raise all these jurisdictional objections (and more) before the District Court in the exercise of its original jurisdiction do not get a second chance thereafter to relitigate the same issues before the District Court under the guise of appellate review of Judge Brozman. Moreover, even assuming *arguendo* that Judge Brozman's jurisdictional determinations were properly before this Court, the Court concludes that Judge Brozman's jurisdictional determinations were correct and that the Bankruptcy Court did not lack jurisdiction to try Leslie Fay's objections to the proofs of claim.

In particular, Judge Brozman was clearly correct in holding that appellants' proofs of claim fall squarely within the statutory definition of "core proceedings." 28 U.S.C. § 157(b)(2)(B); *see In re S.G. Phillips Constructors. Inc.*, 45 F.3d 702, 705 (2d Cir. 1995); *In re Best Prods. Co., Inc.*, 68 F.3d 26, 32 (2d Cir. 1995). As for appellants' argument that their claims are exempted from the Bankruptcy Court's jurisdiction by §§ 157(b)(2)(B) and (b)(5) because they involve non-core "personal injury tort . . . claims," this was never raised before Judge Brozman (but only before Judge Cedarbaum) and therefore there is nothing for this Court to review. *See* August 18, 1997 Decision After Trial on Employees' Discrimination Claims at 47-48. Finally, as to appellants' jurisdictionally related assertion that they were deprived of a jury trial, it is well settled that a creditor who voluntarily participates in the equitable reordering of a debtor's estate by filing a proof of claim has no jury trial rights with respect to

proceedings that involve the allowance or disallowance of those claims. *See, e.g., Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58 (1989); *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990) (per curiam).[1]

*The Denial of the Claims*

Properly applying the relevant principles of the law of discrimination and retaliation, the Bankruptcy Court denied appellants' claims, chiefly on the basis of credibility findings adverse to appellants. Nothing in appellants' papers remotely supports a conclusion that any of these or the Bankruptcy Court's other factual findings were clearly erroneous. Appellants contend, however, that the Bankruptcy Court erred in bifurcating the trial so that it first heard (and decided adversely to appellants) those claims that debtors claimed were barred by validly obtained releases, before deciding appellants' other claims. On the contrary, such bifurcation, which rested within the sound discretion of the Bankruptcy Court, appropriately narrowed the issues and promoted judicial economy, and thus was altogether proper. *Cf. Simpson v. Pittsburgh Corning Corp.*, 901 F. 2d 277, 283 (2d Cir. 1990); *Bormann v. AT&T Comms., Inc.*, 875 F.2d 399, 401 (2d Cir. 1989).[2]

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[1] In fact, the case on which appellants primarily rely in this area, *Germain v. Connecticut National Bank*, 988 F.2d 1323 (2d Cir. 1993), specifically held that "the *Katchen*, *Granfinanciera*, and *Langenkamp* line of Supreme Court cases stands for the proposition that by filing a proof of claim a creditor forsakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim—and does so not so much on a theory of waiver as on the theory that the legal issue has been converted to an issue of equity. It is reasonable that a creditor or debtor who submits to the equity jurisdiction of the bankruptcy court thereby waives any right to a jury trial for the resolution of disputes vital to the bankruptcy process, such as those involving the determination of who is a valid creditor." *Id.* at 1329-30.

[2] Although appellants also assert that the Bankruptcy Court erred in excluding various pieces of evidence, they do not explain why the

*The Award of Fees and Expenses*

Finally, appellants argue that the Bankruptcy Court abused its discretion in approving the award of $9,592,396 in fees and $1,239,845.47 in expenses to debtors' counsel Weil, Gotshal & Manges ("Weil Gotshal"), $311,236.25 in fees and $19,789.63 in expenses to debtors' special labor counsel McDermott, Will & Emery ("McDermott"), and $2,426,226.10 in fees and $204,454.62 in expenses to debtors' special corporate counsel Parker Chapin Platteau & Klimpl ("Parker Chapin"), because all three firms concurrently represented individual Leslie Fay officers and directors and had impermissible conflicts of interest. *See* 11 U.S.C. § 328(c) (giving the Bankruptcy Court the ability to deny compensation to a professional who "at any time during such professional person's employment . . . is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed") *id.*, § 101 (14) (defining "disinterested person" as, *inter alia*, a person who "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders . . . for any . . . reason"). Additionally, according to appellants, the firms did not disclose these conflicts to the Bankruptcy Court as required under Bankruptcy Rule 2014(a).[3]

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exclusion of this evidence was erroneous but rather merely assert that the excluded evidence would have been probative. The Court concludes that appellants have made no showing that the Bankruptcy Court abused its discretion in this regard.

[3] Although appellants also appeal the Bankruptcy Court's order denying them compensation for professional services and expenses, they make nary an argument on the topic in their opening brief, and have therefore waived the issue entirely. *See Knipe v. Skinner*, 999 F.2d 708, 710-11 (2d Cir. 1993); *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648, 653 n.3 (2d Cir. 1979); *see also* Bankruptcy Rule 8010(a)(1)(E). Moreover, the Bankruptcy Court's denial of these fees pursuant to 11 U.S.C. § 503(b)—on the grounds that appellants did not make "a substantial contribution" and that the fees and

Appellants bear the burden of proof in establishing a conflict of interest, *see In re Kliegl Bros. Universal Stage Lighting Co., Inc.*, 189 B.R. 874, 880 (Bankr. E.D.N.Y. 1995), and they have not met this burden with respect to any of the three law firms.[4] Regarding Weil Gotshal, appellants attack as improper that firm's submission of letters on behalf of the Leslie Fay Board of Directors Audit Committee to the District Court in a securities litigation related to the action at hand. But that representation was permitted by the Bankruptcy Court's decision on a disqualification motion involving Weil Gotshal that has not been appealed and of which this Court sees no reason to disapprove. *See In re The Leslie Fay Companies, Inc.*, 175 B.R. 525 (Bankr. S.D.N.Y. 1994). Nor did Weil Gotshal act improperly in participating in the response to appellants' proofs of claim. Although certain of the debtors' objections were filed after December 15, 1994, the date on which the Bankruptcy Court disqualified Weil Gotshal from undertaking further new matters in this litigation, *see id.*, the objections were obviously begun prior to that date and the Bankruptcy Court was aware of and approved of Weil Gotshal's prior role. With respect to appellants' allegations that Weil Gotshal improperly brought about or influenced a large severance payment made to Laura Pomerantz, former member of the Leslie Fay management, there is no showing that Weil Gotshal represented Ms. Pomerantz in any matter relating to her employment agreement or the relevant release. Finally, although appellants argue that Weil Gotshal failed to pursue claims for pre-petition stock transactions conducted by

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expenses were not "actual or necessary" because the firm had never billed or been paid by its clients—was not clearly erroneous. *See generally In re Hooker Investments, Inc.*, 188 B.R. 117, 120 (S.D.N.Y. 1995), *aff'd*, 104 F.3d 349 (2d Cir. 1996).

[4] Appellees further argue that appellants are collaterally estopped from relitigating those aspects of the fee-related issues covered by various orders that have not been appealed or that have already been affirmed on appeal. However, the Court need not reach this issue because it finds appellants' relevant underlying contentions to be without merit.

certain members of Leslie Fay's management, there was no proof that management engaged in any wrongdoing and thus no need to pursue any claims. *See Leslie Fay*, 207 B.R. at 776 n.19.

Regarding McDermott, which represented various officers and directors of Leslie Fay in discrimination suits brought by appellants in the District Court, appellants provide no basis for believing that this representation involved McDermott in representing an interest adverse to the estate or impacted on the firm's disinterestedness as special labor counsel for Leslie Fay. The Bankruptcy Court was aware of McDermott's representation of the individuals when it approved McDermott's retention as special labor counsel. In that connection, McDermott submitted an affidavit stating that the firm had apprised both Leslie Fay and the individuals of the possible pitfalls involved in representing all of them, that they had all consented, and that no conflicts of interest had arisen or were likely to arise since all of those parties took an identical position with respect to appellants' discrimination claims and did not have defenses that were inconsistent with each others' interests. The Bankruptcy Court approved McDermott's retention after finding that the representation created no "actual conflict of interest" and that appellants had "not really identified any facts which suggest . . . anything stronger than the theoretical." Tr. of 10/3/95 Hearing at 25-28. Appellants now advance only speculation, innuendo, and conclusory assertions in support of their argument that McDermott's actions were conflicted and, instead, tainted the Bankruptcy Court's extensive proceedings. *See, e.g.*, Appellants' Reply Brief at 42. This is patently insufficient.

However, one minor aspect of the fee award to McDermott must be remanded to the Bankruptcy Court for further consideration. *See* Fed. R. Bankr. 8013. Although McDermott has admitted that approximately $11,000 of the fees that it was awarded in connection with its representation of the debtors actually related to its representation of the individuals in the discrimination suit, the Bankruptcy court never ruled on this

matter because it concluded that it had already been divested of jurisdiction by appellants' appeal to this Court. Accordingly, this Court will remand this proceeding to the Bankruptcy Court for the limited purpose of having it examine McDermott's billing records, determine which portions relate to matters other than McDermott's representation of the debtors, and set McDermott's final fee award accordingly.

Regarding Parker Chapin, even if the Court overlooks the fact that several of appellants' objections relating to Parker Chapin's fees were not raised before the Bankruptcy Court, the Court concludes that appellants have not in any event demonstrated any impermissible conflicts of interest with respect to that firm. For instance, although appellants characterize as improper Parker Chapin's representation of individual officers and directors in connection with negotiation of certain releases, the releases were negotiated on the debtors' behalf by Wachtell, Lipton Rosen & Katz, counsel for the creditors' committee, not by Parker Chapin. Further, although Parker Chapin was involved in a related state court derivative action, any potential impropriety has been avoided by having the creditors' and equity committees take control over any potential claims by debtors against their former officers and directors and by the creation of the Derivative Action Board, which has independent responsibility for evaluating and prosecuting (if prudent to do so) the derivative action. Appellants' other specific complaints relating to Parker Chapin are in the same vein and are similarly meritless.

*Conclusion*

The Court has carefully considered each of appellants' numerous arguments, including those not discussed above, and found them all to be without merit, except for the one minor aspect relating to McDermott's fees. Accordingly, that limited issue is hereby remanded to the Bankruptcy Court, and all of the other orders appealed from are hereby affirmed in all respects.

SO ORDERED.

/s/ JED S. RAKOFF
JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
July 17, 1998

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Case No. 93 B 41724, *et. seq.* (TLB)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*

---

DECISION ON REMAND

APPEARANCES:

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By: Brian S. Rosen, Esq.

WISEHART & KOCH
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By: Arthur M. Wisehart & Heather R. Boshak, Esqs.

MCDERMOTT, WILL & EMERY
*Debtors' Special Labor Counsel*
1211 Avenue of the Americas
New York, New York 10036
By: Joel E. Cohen & Barbara R. Funt, Esqs.

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TINA L. BROZMAN, Chief United States Bankruptcy Judge:

In an Order dated September 5, 1997, I awarded the law firm of McDermott, Will & ("MW&E"), special labor counsel to the Leslie Fay Companies, Inc. (the "Debtors"), $311,236.25 in final compensation. Subsequently, Jacob V. Falbaum, Anthony Gill, Lee L. Kishbaugh, Emile Lewkowiez, Elizabeth Michaud, and Raymond Terwilliger (the "Claimants") all of whom are former employees of the Debtors who had asserted employment discrimination claims against the Debtors, moved to alter or amend that Order, seeking to vacate the award of fees to MW&E because the firm had inappropriately billed the Debtors' estate for services rendered on behalf of MW&E's clients, the officers and directors of the Debtors (the "D&Os"), in litigation in the Southern District of New York before Judge Cedarbaum (the "District Court Action"). MW&E opposed the motion yet acknowledged that it had committed approximately $11,000 in billing errors and stated that it would immediately reimburse the appropriate sums to the estate.

The Claimants raised other fee-related and billing issues which I never reached because I had been divested of jurisdiction by virtue of the Claimants' filing of a notice of appeal in the district court. Judge Rakoff, in a Memorandum Order dated May 17, 1998, affirmed in full my decision denying the Claimants' claims and authorizing the fee awards, but remanded "for the limited purpose of having [the bankruptcy court] examine McDermott's billing records, determine which portions relate to matters other than McDermott's representation of the debtors, and set McDermott's final fee award accordingly." It should be noted that I was affirmed in my denial of all of the Claimants' claims, as a result of which they hold no allowed claims against the Debtors' estates. The district court's affirmance is, however, an appeal to the Second Circuit.

MW&E submitted a proposed amended order to which the Claimants objected because they believe the proposed $10,461.70 reduction is insufficient. That amount represents

the legal fees incurred by MW&E in defending the D&Os in the District Court Action. Everyone agrees now that those fees were not the obligation of the Debtors but of Aetna Casualty & Surety Company, which had an Interim Funding Agreement with the Debtors for that purpose.[1] The Claimants would have me disallow any fees relating to the negotiation of that agreement between the Debtors and Aetna.[2] However, as I noted once before during the hearing on the Claimants' motion to amend, Aetna's payment of the D&O's attorneys' fees in connection with the District Court Action was a plain benefit to the Debtors because, to the extent Aetna paid, the Debtors were relieved of the obligation to advance funds in accordance with the indemnification provisions of their by-laws. The Interim Funding Agreement therefore benefitted the Debtors, so that any fees occurred in its negotiation were property billed to the estate.

I have undertaken a thorough review of MW&E's billing records and find that the $10,461.70 reduction proposed by MW&E correctly reflects the amount that was improperly

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[1] The Claimants criticize this agreement (which they have never seen) as a secret agreement that somehow harms them. Inasmuch as I expunged after trial all of the Claimants' claims, I cannot conceive of why they ought be entitled now to see this agreement.

[2] The Claimants also urge me to disallow any fees generated by the Adversary Proceeding commenced on behalf of the Debtors against the Claimants which was assigned to Judge Gallet. They argue that it was retaliatory and harassing, evidence of which, they claim, is its discontinuance by MW&E on the eve of trial. This suit was brought by and for the benefit of the Debtors. Nonetheless, MW&E had good reason to abandon the proceedings because, as a result of Judge Gallet's denial of their request to prohibit delving into matters already tried, the Debtors were going to be forced to relitigate essentially the same matters I had decided, in order reach the claims asserted in their complaint. The cost of going forward under those circumstances was burdensome; the Debtors made a calculated decision to quit while they were ahead. There is nothing retaliatory about that. Moreover, MW&E instituted the adversary proceeding only after I had decided the Claimants' employment discrimination claims favorably to the Debtors, not in order to coerce the Claimants to drop their claims before trial.

billed to the Debtors' estate on account of matters that do not relate to MW&E's representation of the Debtors. Accordingly, I am signing their proposed order without change.

Date: New York, New York
December 11, 1998

/s/ TINA L. BROZMAN
CHIEF UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Chapter 11 Case No. 93 B 41724 (TLB)
(Jointly Administered)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

---

ORDER GRANTING APPLICATIONS FOR ALLOWANCE OF COMPENSATION AND REIMBURSEMENT OF EXPENSES

Upon consideration of the applications for allowance of compensation and reimbursement of expenses (collectively, the "Applications") for professional services rendered and expenses incurred during the respective subject periods; and a hearing having been held before this Court to consider the Applications on July 31, 1997; and notice having been given pursuant to Federal Rules of Bankruptcy Procedure 2002(a)(7) and (c)(2) and this Court's Order Establishing Administrative Procedures, dated September 20, 1993; and due consideration having been given to any objections and responses interposed with respect thereto; and good and sufficient cause having been shown therefor, it is hereby;

ORDERED that the Applications are granted to the extent set forth in Schedule "A" annexed hereto.

Dated: New York, New York
September 5, 1997

/s/ TINA L. BROZMAN
UNITED STATES BANKRUPTCY JUDGE

CASE NUMBER: 93 B 41724 (TLB)
CASE NAME: In re The Leslie Fay Companies, Inc. et al.,

| December 1, 1996 through June 4, 1997 | | | | | | |
|---|---|---|---|---|---|---|
| APPLICANT | DATE/DOCKET NO. OF APPLICATION | INTERIM FEES REQUESTED | INTERIM FEES AWARDED | INTERIM EXPENSES REQUESTED | INTERIM EXPENSES AWARDED | TOTAL FEES AND EXPENSES AWARDED AND TO BE PAID (INCLUDING FEES PREVIOUSLY HELD BACK)[1] |
| Weil, Gotshal & Manges LLP | 06/30/97- 4188 | $ 1,227,061.40 | $ 1,227,061.40 | $110,223.60 | $ 110,223.60 | $ 3,095,570.27 |
| Parker, Chapin, Flattau & Klimpl | 06/30/97- 4178 | $ 56,846.31 | $ 56,846.31 | $ 11,623.93 | $ 11,623.93 | $ 434,188.34 |
| Arthur Andersen & Co. (Invest.) | 06/30/97- 4181 | $ 0.00 | $ 0.00 | $ 0.00 | $ 0.00 | $ 210,177.00 |
| Arthur Andersen & Co. (Accts) | 06/30/97- 4180 | $ 248,743.90 | $ 248,743.90 | $ 37,234.73 | $ 37,234.73 | $ 1,569,950.75 |
| Akin, Gump, Strauss, Hauer & Feld, L.L.P. | 06/30/97- 4179 | $ 291,830.00 | $ 291,830.00 | $ 29,743.28 | $ 29,743.28 | $ 519,470.23 |
| McDermott, Will & Emery | 07/09/97- 4195 | $ 94,711.25 | $ 94,711.25 | $ 2,704.97 | $ 2,704.97 | $ 151,547.48 |
| Jay Alix and Assoc. | 06/30/97- 4176 | $ 6,142.25 | $ 6,142.25 | $ 31.14 | $ 31.14 | $ 239,893.58 |
| Wachtell, Lipton, Rosen & Katz | 06/30/97- 4177 | $ 481,238.50 | $ 481,238.50 | $ 56,424.13 | $ 56,424.13 | $ 832,324.50 |
| CIBC/Wood Gundy | 07/01/97- 4183 | $ 5,640:00 | $ 5,640.00 | $ 216.99 | $ 216.99 | $ 166,677.08 |
| Mudge Rose Guthrie | 06/30/97- 4187 | $ 36,587.66 | $ 10,000.00 | $ 0.00 | $ 0.00 | $ 77,968.18 |
| The Blackstone Group | 07/18/97- 4203 | $ 500,000.00 | $ 500,000.00 | $ 8,922.98 | $ 8,922.98 | $ 808,922.98 |
| Lord, Bissel & Brook | 06/27/97- 4170 | $ 134,689.60[2] | $ 0.00[2] | $ 0.00 | $ 0.00 | $ 0.00[2] |
| Latham & Watkins | 06/27/97- 4173 | $ 0.00 | $ 0.00 | $ 0.00 | $ 0.00 | $ 18,44 |
| Rothschild, Inc. | 06/26/97- 4169 | $ 0.00 | $ 0.00 | $ 0.00 | $ 0.00 | $ 55,516.66 |
| Winston & Strawn | 06/27/97- 4172 | $ 0.00 | $ 0.00 | $ 0.00 | $ 0.00 | $ 8,302.75 |
| Price Waterhouse LLP | 07/02/97- 4190 | $ 0.00 | $ 0.00 | $ 0.00 | $ 0.00 | $ 170,619.66 |
| Keen Realty Consultants, Inc. | 06/25/97- 4168 | $ 14,250.00 | $ 14,250.00 | $ 525.37 | $ 525.37 | $ 14,775.37 |
| Bankruptcy Services LLC | 06/27/97- 4171 | $ 5,912.50 | $ 5,912.50 | $ 1,280.68 | $ 1,280.68 | $ 7,193.18 |

SCHEDULE A
PAGE 1 OF 2

DATE:_____ INITIALS:_____USBJ

[1] Net of all prior payments.
[2] The fees requested by Lord, Bissel & Brook shall be the subject of a separate order of the Court.

BEST AVAILABLE COPY

CASE NUM 93 B 41724 (TLB)
CASE NAME: In re The Leslie Fay Companies, Inc. et al.,

| ALL FEE PERIODS (INCLUDING THIS PERIOD) | | | | | | |
|---|---|---|---|---|---|---|
| APPLICANT | TOTAL FEES REQUESTED | TOTAL FEES AWARDED | TOTAL FEES PAID/TO BE PAID | TOTAL FEES HELD BACK | TOTAL EXPENSES REQUESTED | TOTAL EXPENSES AWARDED |
| Weil, Gotshal & Manges LLP | $9,946,473.00 | $9,592,396.00 | $9,592,396.00 | $ 0.00 | $1,240,845.54 | $1,239,845.47 |
| Parker, Chapin, Flattau & Klimpl | $2,465,385.00 | $2,426,226.10 | $2,426,226.10 | $ 0.00 | $ 211,147.00 | $ 204,454.62 |
| Winston & Strawn | $ 36,898.50 | $ 33,211.00 | $ 33,211.00 | $ 0.00 | $ 679.69 | $ 482.12 |
| Arthur Andersen & Co. (Accts.) | $7,760,033.20 | $7,757,407.10 | $7,757,407.10 | $ 0.00 | $ 573,426.03 | $ 573,426.03 |
| Arthur Andersen & Co. (Invest.) | $1,434,263.00 | $1,434,263.00 | $1,434,263.00 | $ 0.00 | $ 68,975.83 | $ 68,975.85 |
| Akin, Gump, Strauss, Hauer & Feld, L.L.P. | $1,042,791.75 | $1,027,396.75 | $1,027,396.75 | $ 0.00 | $ 81,460.17 | $ 81,460.17 |
| McDermott, Will & Emery | $ 311,381.25 | $ 311,236.25 | $ 311,236.25 | $ 0.00 | $ 19,789.63 | $ 19,789.63 |
| The Blackstone Group | $2,300,000.00 | $2,300,000.00 | $2,300,000.00 | $ 0.00 | $ 39,890.77 | $ 34,910.77 |
| Jay Alix and Assoc. | $ 918,647.48 | $ 888,481.75 | $ 888,481.75 | $ 0.00 | $ 98,914.68 | $ 98,035.16 |
| Wachtell Lipton, Rosen & Katz | $1,668,690.75 | $1,668,690.75 | $1,668,690.75 | $ 0.00 | $ 185,250.34 | $ 185,250.34 |
| Price Waterhouse LLP | $1,288,735.60 | $1,279,652.10 | $1,279,652.10 | $ 0.00 | $ 59,469.30 | $ 59,469.30 |
| CIBC/Wood Gundy | $ 809,860.34 | $ 809,860.34 | $ 809,860.34 | $ 0.00 | $ 18,559.84 | $ 16,955.28 |
| Lord, Bissel & Brook | $ 545,728.60[1] | $ 402,732.50[1] | $ 326,030.88[1] | $ 76,701.62[1] | $ 76,819.45[1] | $ 76,188.78[1] |
| Latham & Watkins | $ 82,465.75 | $ 82,465.75 | $ 82,465.75 | $ 0.00 | $ 17,137.14 | $ 17,137.14 |
| Rothschild, Inc. | $ 315,166.65 | $ 315,166.65 | $ 315,166.65 | $ 0.00 | $ 12,094.35 | $ 11,177.10 |
| Equity Committee Members | N/A | N/A | N/A | N/A | $ 3,320.77 | $ 3,320.77 |
| Mudge Rose Guthrie | $ 465,621.26 | $ 429,033.60 | $ 429,033.60 | $ 0.00 | $ 18,399.47 | $ 18,399.47 |
| Stillman, Friedman & Shaw, P.C. | $ 517,996.50 | $ 517,996.50 | $ 517,996.50 | $ 0.00 | $ 41,447.78 | $ 41,447.78 |
| KPMG Peat Marwick | $ 252,246.30 | $ 252,246.30 | $ 252,246.30 | $ 0.00 | $ 137.10 | $ 137.10 |
| Stroock & Stroock & Lavan | $ 791,864.00 | $ 791,864.00 | $ 791,864.00 | $ 0.00 | $ 58,217.53 | $ 57,817.53 |

SCHEDULE A
PAGE 2 OF 2

DATE:_____ INITIALS:_____USBJ

[1] The fees requested by Lord, Bissel & Brook shall be the subject of a separate order of the Court.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Chapter 11 Case No. 93 B 41724 *et seq.* (TLB)
(Jointly Administered)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

---

ORDER EXPUNGING REMAINING CLAIMS OF EMILE LEWKOWIEZ, ANTHONY GILL, JACOB V. FALBAUM, RAYMOND J. TERWILLIGER, ELIZABETH MICHAUD AND LEE L. KISHBAUGH (CLAIM NOS. 00076, 00077, 00078, 00079, 00080 AND 01566)

Upon the objections, dated February 14, 1995, January 17, 1997 and February 28, 1997 (the "Objections"), of The Leslie Fay Companies, Inc. ("Leslie Fay") for an order pursuant to 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code") disallowing the claims of Emile Lewkowiez ("Lewkowiez"), Anthony Gill ("Gill"), Jacob V. Falbaum ("Falbaum"), Raymond J. Terwilliger ("Terwilliger"), Lee L. Kishbaugh ("Kishbaugh") and Elizabeth Michaud ("Michaud") (collectively the "Claimants") arising out of the termination of Claimants' employment with Leslie Fay ("Termination Claims"), as well as various post-termination claims ("Post-Termination Claims"); and due and proper notice of the Objections and the relief requested therein having been given, and Leslie Fay and the Claimants having undertaken significant discovery; and a

trial having been held on October 11, 1995, continued on November 27 and December 11, 1995 and concluded on January 16, 1996, to consider the validity of releases signed by Gill, Falbaum and Terwilliger with respect to those claimants' Termination Claims (the "Releases Trial"), and upon the ruling of the Court dated January 24, 1996, and an Order dated February 2, 1997, upholding the validity of certain releases signed by Falbaum, Gill and Terwilliger (the "Releases") and expunging those claimants' Termination Claims; and a hearing having been held on February 18 and 19, 1997 to estimate the value of the Post-Termination Claims of Gill, Falbaum and Terwilliger and all of the claims of Lewkowiez and Kishbaugh for purposes of confirmation of Leslie Fay's plan of reorganization (the "Estimation Hearing"); and a trial having been held on May 28 and 29, and June 9, 16, and 23, 1997, with respect to the merits of Gill, Falbaum, and Terwilliger's Post-Termination Claims and the entire claims of Lewkowiez, Kishbaugh and Michaud (the "Merits Trial"); and the parties having submitted Post-Trial Memoranda of Law and Reply Memoranda of Law on July 7 and July 15, 1997; and upon consideration of the Objections and all of the pleadings filed in respect thereof; and upon the record of the Merits Trial, and all other proceedings had before the Court; and for the reasons set forth in the Decision After Trial on Employees' Discrimination Claims rendered on August 18, 1997 (the "Opinion") with respect to the Objections as amended by written Order dated Sept. 5, 1997; and after due deliberation and sufficient cause existing therefor, it is hereby

ORDERED that the Objections be, and they hereby are granted in their entirety; and it is further

ORDERED that, pursuant to section 502 of the Bankruptcy Code, the remaining Post-Termination Claims of claimants Falbaum, Gill and Terwilliger be, and they hereby are, disallowed in their entirety; and it is further

ORDERED that, pursuant to section 502 of the Bankruptcy Code, the entire Claims of claimants Lewkowiez, Kishbaugh

and Michaud be, and they hereby are, disallowed in their entirety.

Dated: New York, New York
September 5, 1997

/s/ TINA L. BROZMAN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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97 Civ. 2244 (MGC)
Chapter 11 Case No. 93 B 41724 *et seq.*, (TLB)

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In re:

THE LESLIE FAY COMPANIES, INC. *et al.*,

*Debtors.*

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Adversary Proceeding No. 96/8311A

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THE LESLIE FAY COMPANIES, INC., *et al.*,

*Plaintiffs,*

—against—

JACOB V. FALBAUM, ANTHONY GILL
and RAYMOND TERWILLIGER,

*Defendants.*

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MEMORANDUM OPINION AND ORDER

APPEARANCES:

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BY: Joel E. Cohen, Esq.

WISEHART & KOCH
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*and Raymond Terwilliger*
19 West 44th Street Suite 412
New York, New York 10036

BY: Arthur M. Wisehart, Esq.

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Cedarbaum, J.

Jacob V. Falbaum, Anthony E. Gill, and Raymond J. Terwilliger, former employees of the debtor who have filed proofs of claim. in the Bankruptcy Court alleging employment discrimination, move in this Court for an order withdrawing the reference of Adversary Proceeding No. 96/8311A pursuant to 28 U.S.C. § 157(d). Because Falbaum, Gill and Terwilliger (collectively, the "Creditors") have not demon-

strated that either mandatory or permissive withdrawal is appropriate in this case, the motion is denied.

*Background*

The Leslie Fay Companies, Inc. ("Leslie Fay") filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on April 5, 1993. Prior to that date, Leslie Fay had terminated the employment of each of the Creditors. In connection with the terminations, the Creditors signed severance agreements in which they released and discharged Leslie Fay from any charges, claims or actions arising out of their employment or the termination of their employment. In addition to the releases, the severance agreements included covenants not to sue which provided that the Creditors would not bring any charges, claims or actions against Leslie Fay except those arising after the signing of the severance agreements.

Following their terminations, the Creditors filed age discrimination charges against Leslie Fay with the Equal Employment Opportunity Commission (the "EEOC"). The EEOC dismissed the charges on the ground that the releases precluded recovery.

On May 28, 1993, the Creditors filed proofs of claim against Leslie Fay in the Bankruptcy Court seeking damages for age discrimination. In January 1996, following a hearing, the Bankruptcy Court held that the releases were knowing and voluntary. It therefore upheld the validity of the releases and ruled that those of the Creditors' claims against Leslie Fay that arose prior to the signing of the releases were barred. The claims against Leslie Fay that arose after the releases were signed were not barred and are currently being tried in the Bankruptcy Court.

On March 22, 1996, Leslie Fay commenced an adversary proceeding against the Creditors asserting a claim for breach of contract. In the adversary proceeding, Leslie Fay seeks damages to compensate it for the attorneys' fees, costs and

expenses associated with defending itself against the pre-release discrimination claims that allegedly were filed in breach of the severance agreements.[1] The Creditors now seek an order from this Court pursuant to 28 U.S.C. § 157(d) withdrawing the reference of the adversary proceeding.

*Discussion*

The Creditors argue that both mandatory and permissive withdrawal of the reference apply in this case. With respect to mandatory withdrawal, the Creditors do not make any arguments that have not already been ruled upon in the many previous motions to withdraw the reference of the proofs of claim. Withdrawal is mandated only "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce." 28 U.S.C. § 157(d). The Second Circuit has interpreted this statute to require mandatory withdrawal only where "substantial and material consideration of non-Bankruptcy Code federal statutes is necessary for the resolution of the proceeding." *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 995 (2d Cir. 1990), *cert. denied*, 502 U.S. 808 (1991). The adversary proceeding in this case alleges a simple breach of contract that clearly will not require "substantial and material consideration of non-Bankruptcy Code federal statutes." The Creditors argue, however, that because the issues raised in the adversary proceeding are "inextricably intertwined" with the issues raised by the proofs of claim, interpretation of the Age Discrimination in Employment Act ("ADEA") will be required. But I have already ruled that the issues raised by the proofs of claim will not involve anything more than a

[1] The Creditors have commenced an action in this Court asserting claims of discrimination against individual officers of Leslie Fay. Those individual defendants filed counterclaims dated June 14, 1996, which contain allegations similar to those made by Leslie Fay in the adversary proceeding.

straightforward application of the ADEA to the facts of this case. (Tr. of Hearing in 95 Civ. 2928 (MGC) dated 6/16/95 at 17.) The proceedings in the Bankruptcy Court to date have not altered that determination.

The Creditors also argue that permissive withdrawal of the adversary proceeding is warranted. Section 157(d) provides that a district court "may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." The Second Circuit has held that in deciding whether there is sufficient "cause" for permissive withdrawal, a district court should weigh the following factors, of which the first is the most important: "(1) whether the claim is core or non-core, (2) what is the most efficient use of judicial resources, (3) what is the delay and what are the costs to the parties, (4) what will promote uniformity of bankruptcy administration, (5) what will prevent forum shopping, and (6) other related factors." *In re Burger Boys, Inc.*, 94 F.3d. 755, 762 (2d Cir. 1996) (citing *In re Orion Pictures Corp.*, 4 F.3d 1095, 1101 (2d Cir. 1993), *cert dismissed*, 511 U.S. 1026 (1994)).

The only "cause" for permissive withdrawal suggested by the Creditors is their argument that they are entitled to a trial by jury under the ADEA. However, I have twice ruled that by filing their proofs of claim with the Bankruptcy Court, the Creditors waived their right under the ADEA to a jury trial. (Tr. of Hearing in 95 Civ. 2928 (MGC) dated 6/16/95 at 17; Order in 95 Civ. 2928 (MGC) dated 9/12/95.) The adversary proceeding instituted by Leslie Fay is essentially an objection to the allowance of the claims which also seeks certain affirmative relief. As such, it is part of the claims allowance process that commenced when the Creditors filed their proofs of claim and thus the Creditors do not have a right to a jury trial of the adversary proceeding. *Germain v. Connecticut National Bank*, 988 F.2d 1323, 1330 & n.9 (2d Cir. 1993); *see also Langenkamp v. Culp*, 498 U.S. 42 (1990) (per curiam) (by filing proof of claim, creditor submits to equitable jurisdiction of bankruptcy court and is not entitled to jury trial on

trustee's subsequent preference action). Thus, the argument of the Creditors does not support permissive withdrawal.

Moreover, the claim asserted in the adversary proceeding is a core matter. Section 157(b)(2)(C) provides that core proceedings include "counterclaims by the estate against persons filing claims against the estate." The adversary proceeding is nothing more than a counterclaim by Leslie Fay to the proofs of claim filed by the Creditors. In addition, it arises out of the same transaction as the proofs of claim and concerns the same severance agreements that were the subject of the hearing in the Bankruptcy Court to determine whether the pre-release ADEA claims could proceed. Adjudication of the adversary proceeding will require consideration of the issues raised by the proofs of claim. The Creditors themselves argue that the adversary proceeding is both "inextricably intertwined" with the proofs of claim and an "outgrowth" of the proofs of claim. (Creditors' Mot. ¶¶ 28, 30.) Accordingly, the adversary proceeding is a core matter. *See In re Manville Forest Products Corp.*, 896 F.2d 1384 (2d Cir. 1990) (adversary proceeding asserting debtor's objection to creditor's proof of claim is core); *In re Seatrain Lines, Inc.*, 198 B.R. 45, 50 n.7 (S.D.N.Y. 1996) debtor's adversary proceeding against creditor is core matter only when it arises out of same transaction as proof of claim and thus functions as counterclaim); *In re Lombard-Wall, Inc.*, 48 B.R. 986 (S.D.N.Y. 1985) (where claim in adversary proceeding arose out of same transaction as proof of claim and would require interpretation of same contracts as proof of claim, adversary proceeding was counterclaim under 28 U.S.C. § 157(b)(2)(C)). The fact that the adversary proceeding in this case is a core matter weighs against permissive withdrawal.

In addition, the other factors in this case do not support withdrawal. Judicial economy would not be served by withdrawal of the reference at this time. The Bankruptcy Court has already held an extensive hearing on the releases in connection with the proofs of claim. The adversary proceeding will require consideration of the same releases as well as the

issues raised by the age discrimination claims. Moreover, the adversary proceeding is currently scheduled to be tried in the Bankruptcy Court on September 8, 1997. To withdraw the reference at this time would delay resolution of the matter. Finally, the Creditors' contention that withdrawal of the reference would eliminate "a duplicative, unnecessary proceeding in the Bankruptcy Court and a drain upon [the Creditors'] very slender resources," (Letter from Wisehart dated 7/21/97), is not persuasive. It is the Creditors' repeated attempts to withdraw the reference based on arguments that have already been ruled upon that are duplicative and unnecessary.

*Conclusion*

For the foregoing reasons, the motion to withdraw the reference of Adversary Proceeding No. 96/8311A is denied.

SO ORDERED.

Dated: New York, New York
September 5, 1997

/s/ MIRIAM GOLDMAN CEDARBAUM
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Case No. 93 B 41724, *et. seq.* (TLB)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*

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DECISION AFTER TRIAL ON EMPLOYEES' DISCRIMINATION CLAIMS

APPEARANCES:

FOR THE CLAIMANTS

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FOR THE DEBTORS

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TINA L. BROZMAN, Chief United States Bankruptcy Judge

The Leslie Fay Companies, Inc. ("Leslie Fay"), a domestic clothing manufacturing company which has confirmed a plan of reorganization, objects to the claims of six former employ-

ees all of whom contend that they were the victims of one form or another of prohibited discrimination in regard to either or both the termination of their employment and Leslie Fay's failure to rehire them. Collectively, the claimants seek over $80 million in asserted administrative priority claims. These claimants are not alone in the ranks of the terminated, for over the course of four years, Leslie Fay let go some 3,700 employees, constituting two-thirds of its work force.

Claimant Elizabeth Michaud, who suffers from diabetes and hypertension, alleges that she was not promoted and suffered a series of discriminatory and humiliating acts deliberately inflicted upon her by her supervisor which made it impossible for her to perform her duties effectively or to remain in her position. She contends that she was thereby constructively discharged and suffered retaliation due to her gender and disability in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.* (McKinney 1993), and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. § 951 *et seq.* (1996).

Jacob Falbaum, Anthony Gill, Lee Kishbaugh, Emile Lewkowiez and Raymond Terwilliger allege that their employment with Leslie Fay was terminated and they were not rehired because of their ages, in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.* (1985), the New York State Human Rights Law ("NYSHRL"), article 15, and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Stat. Ann. § 955. In addition, Terwilliger claims that, in violation of the ADEA, he was terminated in retaliation for voicing objections to Leslie Fay's discriminatory employment practices.

I.

*A. Background and Prior Proceedings*

Leslie Fay, a Delaware corporation with its principal place of business in New York, was a publicly held company engaged in the design, manufacture and sale of diversified lines of women's dresses, suits, blouses and sportswear. It operated in two major divisions, its core businesses, called "Leslie Fay", and its "Sassco" division.[1] On April 5, 1993, precipitated by the discovery of certain "accounting irregularities," Leslie Fay and certain of its affiliates filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code. Although the magnitude of the overstatement of its financial statements was not fully identified at the time of the filing, eventually the company restated its earnings for the years 1990, 1991, and 1992 to reflect income that was some $81 million less than had been originally reported. *See generally In re Leslie Fay Cos., Inc.*, 207 B.R. 764 (Bankr. S.D.N.Y. 1997); *In re Leslie Fay Cos., Inc.*, 175 B.R. 525 (Bankr. S.D.N.Y. 1994).

Leslie Fay continued to operate its business and manage its property as a debtor in possession. In due course, a final date for the filing of proofs of claim was fixed and the six claimants filed proofs of claim against the estate.

All of the claimants save Terwilliger worked in Leslie Fay's domestic manufacturing or distribution facilities in Pennsylvania. Terwilliger, who served as Leslie Fay's Vice President of Human Resources, was also based in Pennsylvania. Falbaum and Lewkowiez were terminated in August 1992, pursuant to a reduction in force ("RIF"); Terwilliger's employment was terminated the same month, but not pursuant

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[1] As a result of the confirmation and consummation of its plan of reorganization, Leslie Fay's two divisions were spun off into separate corporations owned by its creditors. Both entities would be liable for the payment of the claimants' asserted administrative claims, if they are sustained. General unsecured claims are payable through a combination of a small amount of cash and stock of both surviving entities.

to the RIF; Gill's employment was terminated in May 1992, not pursuant to an RIF; Kishbaugh was terminated post-bankruptcy in connection with the November 1993 closing of his factory; and Michaud retired on December 31, 1992. (Pre-Trial Order, Undisputed Facts at ¶¶ 4, 6, 8, 10, 13, and 16).

Under Leslie Fay company policy, an involuntarily terminated employee was not eligible for severance benefits unless he or she executed a release agreement waiving any and all claims against the company in connection with his or her employment or the termination thereof.[2] Pearson, Tr. 67 (October 11, 1995); Tully, Tr. 95-96 (Feb. 18, 1997); Silvi, Tr. 38-39 (Feb. 18, 1997). Leslie Fay offered Falbaum, Gill, Terwilliger, Kishbaugh and Lewkowiez the opportunity to obtain severance benefits in consideration for the execution of releases. Because Michaud retired, she was not offered severance and did not sign a release.

Falbaum, Gill, Terwilliger and Kishbaugh executed releases by which they agreed to "release and discharge [Leslie Fay] from any and all charges, claims and actions arising out of [their] employment with [Leslie Fay]. . ." Each of them received severance benefits. Kishbaugh's release was concededly invalid, although he has not returned the severance benefit in return for which he executed the release. Lewkowiez declined to sign a release and thus received no severance. Lewkowiez, Tr. 183-84 (Feb. 18, 1997) and Tr. 72 (May 28, 1997).

Despite their execution of releases, Falbaum, Gill and Terwilliger filed charges with the Equal Employment Opportunity Commission ("EEOC"), the New York State Division of

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[2] Citations to testimony from the trial are designated as "[witness last name), Tr. [page number] ([date of testimony]). Where there was more than one witness with the same last name, the witness' first initial is also indicated. Exhibits admitted during the trial that were introduced by the Claimants are referenced as "CL's Ex. [number]" and those introduced by the Debtors are referenced as D's Ex. [number]. Where helpful, a brief description of the exhibit will follow the exhibit number. Exhibits admitted during the release hearing will be referenced as Release Hearing, Ex. [number].

Human Rights and the Pennsylvania Human Relations Commission against Leslie Fay and certain of its former officers and directors. Lewkowiez and Michaud did the same. While these charges were pending, those of the claimants who had by then been terminated filed their proofs of claim. Fourteen months later Kishbaugh, newly terminated, did so, too.

On February 14, 1995, Leslie Fay filed objections to the proofs of claims interposed by Falbaum, Gill and Terwilliger on the ground that the claims arising before or out of their terminations were barred by the assertedly valid releases which they had executed. I ordered the proceedings bifurcated so that the merits of the discrimination claims would not be tried until the issue of the binding effect of the releases was first determined. I conducted a trial on that limited issue on October 11, November 27, and December 11, 1995 and January 16, 1996. On January 24, 1996, I read into the record my decision upholding the validity of the releases. By order dated February 7, 1996, I expunged the pre-termination and termination-related claims of the three claimants. Needless to say, perhaps, the release portion of the claims objection hearing constitutes part of the record here. In any event, the parties stipulated that the testimony taken and exhibits admitted into evidence were deemed a part of this record.

The releases aside, Falbaum, Gill and Terwilliger all contend that Leslie Fay did not rehire them because of their ages. Inasmuch as those claims allege discriminatory acts separate and distinct from their employment and termination claims and were not encompassed within the releases, they are not barred. *See* 29 U.S.C. § 626(f)(1)(C).

Although Kishbaugh's release does not comport with the mandatory requirements of the Older Workers Benefit & Protection Act ("OWBPA"), 29 U.S.C. § 626(f), the 1990 amendment to the ADEA, Leslie Fay nevertheless contends that Kishbaugh may he said to have ratified the release, or, stated differently, to have waived the protections of the OWBPA, because he failed to tender back the severance benefits he received under the release agreement.

On the eve of the hearing to consider approval of the joint plan of reorganization filed by the debtors and the Official Committee of Unsecured Creditors, Leslie Fay filed objections to the claims of Kishbaugh, Michaud and Lewkowiez. Because there was insufficient time before the scheduled confirmation hearing to ready the balance of the matters for trial, I held an estimation hearing on February 18 and 19, 1997, with regard to all of the claims except Michaud's. Its purpose was to enable me to determine whether the plan had been accepted and whether it was feasible.[3] I indicated that my factual findings would have no preclusive effect at trial although any legal principles decided would be binding. *See In re Ralph Lauren Womenswear, Inc.*, 197 B.R. 771, 775 (Bankr. S.D.N.Y. 1996) (in estimating claims, bankruptcy court may use whatever method is best suited to the circumstances of the case). Among the legal determinations which I made was that the claims asserted by Gill, Terwilliger, Lewkowiez, and Falbaum were all general, unsecured claims. (I did not deal with the priority of Kishbaugh's claim because I had estimated its value at zero.) Subsequently, the parties commendably stipulated to admit into evidence all of the testimony taken and exhibits admitted during the estimation hearing. The remaining testimony was adduced and evidence received during the trial held on May 28 and 29, and June 9, 16, and 23, 1997.

### *B. Leslie Fay Reduces Its Work Force*

In the early 1990s, Leslie Fay's so-called Dress Group (which is part of the core "Leslie Fay" businesses) maintained

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[3] The claimants sought $80 million in administrative priority claims. If valid in amount and priority, the claims would have rendered the plan unconfirmable because administrative claims must be paid in full on the effective date of the plan or as otherwise agreed by the individual administrative claimants. On the other hand, if the claims were not priority claims but general unsecured claims valued at $80 million, the negative vote of the claimants could have defeated the plan. This state of affairs mandated that I fix a value and, for those with value, priority for the claims prior to considering confirmation of the plan.

substantial domestic manufacturing operations in Pennsylvania, including factories, a distribution center and independent contractor shops which produced some of its goods. The Dress Group's design staff, technical services personnel, and sales and materials management were headquartered in New York. All of the plaintiffs except Terwilliger were employed in the Dress Group. Terwilliger was a senior executive with duties regarding all of Leslie Fay's operations.

In the spring of 1991, Sanford Mazur, Leslie Fay's most senior executive in charge of manufacturing, had fallen ill and announced his intention to retire. While he was recuperating, Leslie Fay hired Max Weinstein (age 43) as Senior Vice President of Operations for the Dress Group. Mazur remained with the company for a time thereafter. John T. Cawley (age 57), who had been with Leslie Fay some 40-odd years and was Mazur's right-hand man, was the Vice President of Domestic Manufacturing, running the manufacturing plants. When Weinstein arrived, Cawley began reporting to him. Late that year, Weinstein, part of whose mandate was to revamp the Dress Division, determined to lay off approximately 18 people. That trickle later grew into a flood.[4]

In the spring of 1992, when Leslie Fay employed approximately 5,648 people in its domestic divisions, the Chairman of the Dress Group informed Weinstein that, as a result of a decline in sales volume, overhead would have to be further cut. Weinstein, Tr. 9 (Oct. 11, 1995). Weinstein undertook in earnest consolidating domestic manufacturing operations with an eye toward achieving greater efficiency and cost savings. *Id.*, Tr. 277-78 (May 29, 1997). This meant more layoffs would occur.

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[4] By 1993, the Dress Group terminated 500 employees. D's Ex. B. By 1994, the Dress Group terminated an additional 976 employees. *Id.* By 1995, the Dress Group terminated another 644 employees. *Id.* By 1996, the Dress Group cut a very substantial portion of its work force, 2,361, leaving only 752 persons in its employ. *Id.* The bulk of the layoffs occurred after Leslie Fay filed for chapter 11 relief.

Terwilliger was the chief witness for the claimants attesting to the age-biased animus driving the layoffs in Pennsylvania. He testified that before Weinstein was hired Leslie Fay's policy during layoffs was to terminate according to length of service and qualifications ("skills and seniority"). *See also* Ex. 65. Leslie Fay historically reassigned people to different functions based upon their broad experience in the industry. Terwilliger, Tr. 949 (June 23, 1977); L. Kishbaugh. Tr. 664 (June 16, 1997). Terwilliger commented that this changed under Weinstein. At Cawley's direction, the department heads of the different facilities compiled a list of people to be targeted for the necessary August 1992 RIF. After the list had been prepared, Robert Silvi, the Dress Group's Human Resources Manager, was directed by Weinstein to add more younger names to the RIF list; Cawley supplied the additional names. Silvi, Tr. 108-115 (May 28, 1997); Weinstein, Tr. 11 (Oct. 11, 1995). The consolidations and the RIFs which implemented them affected employees of all ages and all levels within the organization, union and nonunion. *See* Ex. B; Release Hearing Ex. D4; Weinstein, Tr. 10, 12-13, 39 (Oct. 11, 1995). As part and parcel of this new strategy, Leslie Fay also increased emphasis on imports. Weinstein, Tr. 284 (May 29, 1997).

Although Terwilliger suggested otherwise, at least three of Leslie Fay's former employees who were responsible for administering the RIFs testified that they were not instructed to discharge older workers nor were they told that older workers should be targeted for termination. Cawley, Tr. 18-19 (Feb. 18, 1997); Silvi, Tr. 43-44 (Feb. 18, 1997), Gordon, Tr. 66-67 (Feb. 18, 1997). This testimony was confirmed by Roger Vallecorse, who worked in the Human Resources department beginning in the year prior to Terwilliger's departure and eventually replaced Terwilliger. Cl.'s Ex. 76, Deposition of Vallecorse, at 68 (July 5, 1995). Weinstein testified that he allowed the persons with the knowledge of the employees to select those to be terminated. Weinstein, Tr. 10, 39-40 (Oct. 11, 1995); Tr. 312 (May 29, 1997).

Silvi explained that, although he had never been directed to add names before, it was his general understanding as a human resource manager that it was an acceptable procedure to review layoff lists to ensure they were in compliance with the law. Tr. 119-121, 130 (May 28, 1997). Vallecorse testified that when RIFs were being implemented ages of employees were always discussed. Cl.'s Ex. 76 (July 5, 1995).

Terwilliger, who had not objected to the original August 1992 RIF list, objected to the instruction to add more younger people, warning Cawley that to do so could cause later problems. Terwilliger, Tr. 266-69, 290 (Nov. 27, 1995); Cawley, Tr. 136-39 (May 28, 1997). He also voiced his concern to Alan Golub, Leslie Fay's then President, who assured Terwilliger that if outside counsel, Michael Thrope, okayed the course of action that Terwilliger shouldn't worry about it. Terwilliger, Tr. 223 (Nov. 27, 1995). Terwilliger acknowledged that the August 1992 RIF list, pursuant to which both Lewkowiez and Falbaum were terminated, was amended several times.

Neither the drafts nor the final August 1992 RIF list are available, leading the claimants to conclude that the missing documents must contain information damaging to Leslie Fay. Silvi testified, however, that draft layoff lists are not maintained by the company; only the implemented, final lists are. Although Leslie Fay's witnesses testified as to their efforts to locate the final August 1992 list, they simply could not find it. Pearson, Tr. 85-89 (Oct. 11, 1995); Tr. 168-171 (May 28, 1997); Silvi, Tr. 49-50 (Feb. 18, 1997), Tr. 105-121 (May 28, 1997).

A word about credibility is a necessary departure from the chronology. I found the testimony of Silvi, Cawley and Gordon to be straightforward and credible. Vallecorse testified through admission of his deposition, so I did not have the opportunity to observe him, however, his testimony appears to have been quite candid regarding Leslie Fay's shortcomings. Weinstein, too, was a credible witness. Terwilliger, however, was less so. As I observed during the release portion of

this trial, Terwilliger told conflicting accounts of events, answered questions evasively and had significant lapses in memory. As will become apparent as I recount the facts, Terwilliger continued his practice of contradicting himself. For the most part, I have discounted his testimony except when it was independently confirmed.

The manufacturing facilities were phased out over time with some being consolidated into other plants and afterwards closed outright. The consolidation of Leslie Fay's domestic manufacturing facilities and the implementation of RIFs continued during the bankruptcy period until August 1, 1995, when the last of the domestic factories was closed and substantially all of the remaining manufacturing employees were terminated, with the exception of certain quality control personnel. Cawley, Tr. 6-8 (Feb. 18, 1997); Tully, Tr. 100-01 (Feb. 18, 1997). Leslie Fay continues to operate its distribution center in Laflin, Pennsylvania, from which it distributes the merchandise which it imports. Id. 27-28. Leslie Fay thus uses its remaining work force primarily for quality control and distribution of imported goods.

### *C. Investigation of Alternatives to Importing Goods*

Before Leslie Fay decided to shut down all domestic manufacturing, its engineering department began investigating the viability of a "unit production system" as a way to make domestic manufacturing more profitable. The claimants assert that Leslie Fay could have manufactured profitably in the United States utilizing a unit production system but the company chose instead to close the factories to mask its scheme to rid Leslie Fay of older workers. In support of this theory the claimants turn to the testimony of Nina Kishbaugh, plaintiff Kishbaugh's wife, who is a former Time Study Production Engineer for Leslie Fay. Ms. Kishbaugh testified that a study she and others in the engineering department conducted showed that Leslie Fay could have manufactured domestically at a profit had they implemented a unit production system. N. Kishbaugh, Tr. at 740-41 (June 23, 1997). She admitted, how-

ever, that her study was historical in viewpoint, not containing projections as to what future operations might produce. She also admitted that Leslie Fay did not simply reject the concept of a unit production system, rather the company conducted another internal study on the profitability of domestic manufacturing before concluding that such operations had to be abandoned. That study showed that the savings attributable to the use of the unit production system were not sufficient to enable Leslie Fay to continue its existing operations under the labor contracts it had then in force. N. Kishbaugh, Tr. 793-94 (June 23, 1997). Ms. Kishbaugh recalled that when Cawley had learned of the results of her study he commented that it was "too bad that Leslie Fay had not started the unit production system earlier." In light of this testimony, I do not believe that Leslie Fay engaged in an elaborate ruse to close the factories so as to get the older employees off its payroll.

The claimants also suggest that Leslie Fay's destruction of the engineering department's reports in the last two weeks of July 1995 prove that Leslie Fay was covering up the fact that domestic manufacturing could have been profitable but for Leslie Fay's decision to terminate all of its experienced workers in order to facilitate the elimination of older employees. However, Ms. Kishbaugh admitted that *all* of the documents that the engineering department had accumulated over the prior eighteen to twenty years had to be destroyed because the information contained within them was not for the general public and the manufacturing facilities as to which they pertained were closing. N. Kishbaugh, Tr. 730-31 (June 23, 1997). Moreover, the documents were not destroyed until Route 315, the last facility to close, was shut down. There is absolutely no suggestion from that evidence that Leslie Fay was destroying files in order to hide any RIF list or the results of Ms. Kishbaugh's study.

### *D. The Consolidation of Functions and Closing of the Manufacturing Plants*

Around the time that the 1992 downsizing began, Leslie Fay's Dress Group operated out of eight manufacturing or distribution facilities in Pennsylvania—"Downing Garment," "Ricky Fashions," "Andy Fashions," "Pittston," "Kingston," "Laflin," and "Throop." The main facility was located at "Route 315." Each manufacturing facility was run by a factory manager. The six managers and their ages in 1992 were: (1) Joseph Bachkosky (age 40; hired 1974) managed Ricky Fashions; (ii) Kishbaugh (age 52, hired 1976) managed Downing; (iii) James McGavin (age 33, hired 1980) managed Pittston; (iv) Phil Marino (age 33; hired 1981) managed Throop; (v) Ron Pitcavage (age 49, hired 1984) managed Kingston, and (vi) Tommy Gill (age 50+ and plaintiff Gill's brother) managed Andy Fashions, The following other managers were also in place in 1992: Gill (age 57; hired 1978) was a production manager; Falbaum (age 53; hired 1977) was the number two person at the distribution center at Laflin; and Lewkowiez (age 56; hired June 1984) headed up quality control, a job which required oversight of manufacturing at all of the factories.

As Leslie Fay consolidated functions and operations to reduce overhead it also put greater emphasis on importing lower-cost garments. Weinstein, Tr. 278 (May 29, 1997); Granahan. Tr. 194 (May 28, 1997). This, in turn, caused two significant operational changes. When garments were imported, it was necessary to exercise efficient "quality control" to ensure that they met specified criteria before Leslie Fay shipped them out to customers. Weinstein implemented a new audit system employing "statistical sampling" of finished garments to expedite the flow of merchandise to customers. Leslie Fay's "examiners"[5] would now test certain predeter-

[5] "Examiners" look at completed garments before they are shipped, weeding out those which have defects. This is in contradistinction to the "quality control" function which aims to define acceptable parameters for garments before they are manufactured and to enforce

mined percentages of every cut of finished garments. Previously Leslie Fay had tested 100% of the first (and sometimes second) cut of each style and subsequent cuts were then passed through. However, with large shipments of imported garments arriving all at once, the old method could not be performed efficiently. Weinstein, Tr. 278, 283-94; Granahan, Tr. 200, 283-285 (May 28, 1997).

The second change which Weinstein instituted to accommodate the increase in imports was to move quality control for domestic manufacturing out of the distribution center and into the manufacturing plants. Rather than focusing on quality control for domestic manufacturing in the now over-burdened Laflin facility where the product was to be bagged, tagged, and prepared for shipping, Weinstein emphasized catching the quality control problems right at the manufacturing plants before the garments ever reached Laflin. Weinstein instructed the plant supervisors and quality control people who were already employed at the plants that they would now have responsibility for their own quality control. Weinstein, Tr. 285 (May 29, 1997). This change did not bode well for Lewkowiez.

When he was making decisions regarding the consolidation of functions, Weinstein concluded that Lewkowiez's position and input into the creation of manufacturing specifications was a luxury that Leslie Fay could no longer afford. Weinstein, Tr. 277-78 (May 29, 1997). Thus Leslie Fay terminated Lewkowiez in August 1992 as part of the RIF. Weinstein explained that almost seventy percent of Lewkowiez's job was spent at the Route 315 facility working with the manufacturing people in order to edit the production techniques, suggest alternative methods of manufacturing, and create the documentation that would be the guideline to the factories for putting garments together and determining what tolerances to provide. Weinstein, Tr. 278-89 (May 29, 1997). As he contemplated methods of shaving cost, Weinstein realized that

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fidelity to those specifications before the garments are delivered for shipping.

Lewkowiez's functions could all be and, to a large extent already were being, performed by Cawley, Fred Wesstrum (the Chief Engineer), and the production pattern makers, specification technicians, engineers and costing personnel who were all involved in the process.

Cawley testified that the six or eight people who had reported Lewkowiez began to report to the production head for each division, who in turn reported to Cawley. When Lewkowiez was terminated, Leslie Fay promoted Joseph Guarilia (age 57) to manage the examining function at Laflin. Plaintiff Michaud, the examining supervisor, was passed over in the process, to her great consternation. Guarilia then reported to a production person named Lee Granahan (age 36), who had been with Leslie Fay since 1974. Within a year or two Granahan was laid off. Leslie Fay rehired him for a low-level distribution position in 1977, where he worked his way up to more senior positions until 1990, when he left voluntarily to work for Liz Claiborne. Plaintiff Falbaum, to whom Granahan reported at the time he left, re-recruited Granahan later that year and gave him the Production Manager position which he held at the time Lewkowiez was terminated. Falbaum asked Granahan to return because of Granahan's qualifications and not because of his age.

In November 1992, as part of its consolidation strategy, Leslie Fay moved Ricky Fashions up to Route 315. Joe Bachkosky (who was then 40), its manager with 14 years' experience (and who had been at Leslie Fay for 18 years), was not terminated, but transferred to Route 315 with his staff. Ex. G, Tr. 660 (June 16, 1997).

In early 1993, Gordon, Leslie Fay's in-house counsel, advised Leslie Fay that he would be retiring at the end of the year. Vallecorse was also leaving. With continued cost-cutting in mind, Leslie Fay decided to consolidate its human resource, shareholder relations, and legal functions and employed an executive search firm to locate an appropriate candidate to fill all three jobs. The firm turned up Katherine Connors, who was employed at Liz Claiborne, and Leslie Fay

successfully recruited her to Leslie Fay on August 1, 1993. Connors, Tr. 376 (May 29, 1997). She was the first of numerous Liz Claiborne alumni hired by Leslie Fay.[6]

With its new dependence on importing, Leslie Fay hired Don Ochs (age 52) in October 1993 to head up production as Senior Vice President of Worldwide Sourcing. Prior to joining Leslie Fay, Ochs had been employed at a similar position at Liz Claiborne; he thus brought experience which was lacking at Leslie Fay. Throughout 1993 and 1994, Ochs recruited Mary Siercho (age 41), Katherine Bini (age 48), Don Ciley (age 48), Dick Hastings (age 57), Dan Liedy (age 49), Amr Fahmy (age 31), and Keith Farrell (age 37), people with whom he had worked at Liz Claiborne. Terwilliger testified that Leslie Fay often became enamored with recruiting people from other successful businesses and that such affiliations often became paramount in hiring decisions. Lewkowiez acknowledged that this type of recruiting was not unusual for the industry; Falbaum admitted that he had entered Leslie Fay's employ in a similar manner.

By August 1993, Leslie Fay decided to close most of the domestic manufacturing factories and bring operations into the main Route 315 plant one by one. L. Kishbaugh, Tr. 213 (Feb. 18, 1997). Leslie Fay told Kishbaugh of its plan and further that Downing Garment, Kishbaugh's factory, would be the first to close. Leslie Fay also informed him that no factory managers would be transferred.

Kishbaugh's factory closed on November 12, 1993; the 53 year-old Kishbaugh, with 16 years' experience as a Leslie Fay factory manager, was terminated. Downing Garment's non-management work force was combined with Ricky Fashions', and Leslie Fay kept Bachkosky, the 41 year-old manager who had been employed at Leslie Fay two years longer than Kishbaugh. Cawley explained that this was done because Bachkosky was the plant manager of Ricky Fashions, the

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[6] Granahan was rehired first, but his stint with Liz Claiborne was very brief; the great majority of his working years were spent at Leslie Fay.

largest of the plants. Cawley, Tr. 14-15 (Feb. 18. 1997). Bachkosky had the most experience in operating a large factory, which was important given that the combined facility was even bigger than Ricky Fashions.

One month later, Leslie Fay closed Andy Fashions and moved operations up to Route 315. Leslie Fay terminated Andy Fashions' manager (age 50+). With Andy Fashions now included in his responsibilities, Bachkosky was "spread very, very thin" and could not handle all the functions. N. Kishbaugh, Tr. 760-61 (June 23, 1997)..

Having learned that Bachkosky could not oversee all the transferred operations, when Weinstein closed the next plant (Pittston) in early February 1994 he did not terminate the factory manager, James McGavin (age 40), but instead transferred him to Route 315. Tr. 642 (June 16, 1997); 761 (June 23, 1997). Pittston was the same size as Andy, which had been closed two months before. Kishbaugh, Tr. 237 (Feb. 18, 1997). McGavin then headed up the now-combined Pittston/Andy Fashions division (which removed Bachkosky from responsibility for Andy Fashions). To further assist Bachkosky by supervising the Downing employees, in March 1994 Leslie Fay also hired Annmarie Murphy, a woman in her early forties who had been a supervisor from an outside contract shop. Tr. 774 (June 23, 1997). Although McGavin had fewer years' experience and a little less seniority than Kishbaugh, he was familiar with the Pittston management and staff who were transferred to the combined facility.

When Kishbaugh heard that McGavin had been transferred, contrary to the information given to him that factory managers would not be retained as their factories were closed, he reapplied to Leslie Fay in March 1994 for the Factory Manager position of Pittston/Andy Fashions. Cl's Ex.5. He never received a response.

In the Spring of 1994, during the bankruptcy, Leslie Fay's union employees went on strike, staying off the job for 40 some-odd days. Marino and the other management employees from his factory (Throop) filled in for striking workers at

Laflin. He and his non-union supervisory employees did whatever needed doing; in that manner, Marino obtained hands-on examining experience. N. Kishbaugh, Tr. 695 (June 16, 1997). Leslie Fay did not reopen Throop after the strike ended. This had salutary consequences for Marino (age 35) who, instead of being terminated, was transferred to Laflin along with at least three of the other management employees from Throop. The function which he performed at Laflin was entirely different from his job at Throop, however. He became the head of quality control based on his newly-acquired skills combined with his many years of experience as a plant manager. Cawley, Tr. 141, 163 (May 28, 1997).

Several months later, in December 1994, Leslie Fay closed Kingston, and Ron Pitcavage (age 51), the factory manager who had had some 20+ years' experience as a factory manager, was terminated. By August 1995, Route 315 closed and Bachowky, McGavin, Cawley, and Ms. Kishbaugh were all terminated. Cawley, Tr. 27-28 (Feb. 18, 1997); Tully, Tr. 100-01 (Feb. 18, 1997). Weinstein had also been let go in fall of 1994; Ochs on February 10, 1995; Leidy on March 20, 1995; Farrell on June 20, 1995; Sierchio and Fahmy on July 21, 1995; and Ciley on July 28, 1995. In fact, all of the factory managers except Marino and all of the staff that Ochs had hired was eventually terminated, except Bini (age 50), who continues as the Vice President of Piece Goods Purchasing. Marino remains as the Quality Control Manager.

Because the circumstances of the six claimants require individual examination, I turn to the facts more specific to each of them.

### *E. Facts Specific to Each of the Claimants*

#### 1. *Lewkowiez*

Emile Lewkowiez was 56 when Leslie Fay terminated him from his position as the Director of Quality Control for the Dress Division on August 5, 1992. Originally hired by Terwilliger in July 1979 for another position (at age 43),

Lewkowiez left Leslie Fay to move elsewhere with his family in June 1980. Some years later, he returned to Leslie Fay (at age 48) when Terwilliger hired him for the quality control directing position pursuant to a written offer of employment dated May 30, 1994. D's Ex. 1. At that time, Mazur allegedly assured Lewkowiez that he would have tenure and would only be fired for cause. However, the offer letter, which was signed by Terwilliger and provides Lewkowiez with various perquisites, contains no representations by Leslie Fay that Lewkowiez was being offered "career employment" or that he could only be fired for cause.

Claiming that Leslie Fay terminated and failed to rehire him because of his age, Lewkowiez points out that younger, less qualified persons were retained or hired in the area of "quality control," and that those persons who had formerly reported to him now reported to Granahan, who was in his 30s. Tr. 12, 30, 854; Exs. 15, 57. Lewkowiez was mistaken regarding Granahan. Whereas the people at the Laflin facility (like Michaud) who had reported to Lewkowiez now reported to Granahan, the other employees who had reported to Lewkowiez began reporting to the production heads at each of their own facilities. *See* Cawley, Tr. 27 (Feb. 18, 1997). Cawley testified that although Lewkowiez was "very talented," his position was eliminated as a result of the downsizing, and no one was hired to replace him. Cawley, Tr. 278-79 (May 29, 1997); *see also* Silvi, Tr. 43 (Feb. 18, 1997). Lewkowiez's function did not embrace the "examining" aspects of quality control, although the examining supervisor, at least for a time, reported to him. Rather, Lewkowiez assured quality control in the manufacture of goods from their inception. Consistent with this focus and recognizing that the future in manufacturing was overseas, Lewkowiez had informed Cawley in February 1992 that he was interested in an available position as Quality Control Manager for Leslie Fay in Indonesia. Cawley responded that Lewkowiez was much too valuable in Wilkes-Barre and that Wilkes-Barre was the best place to stay. Lewkowiez, Tr. 179 (Feb. 18, 1997). As

it turned out, Cawley's son, John (age 32), got the Quality Control job in Indonesia in June 1992, just two months before Lewkowiez was terminated. Lewkowiez provided a lengthy analysis, well supported by other testimony, that he was indeed the better choice for the Indonesian position. However, Lewkowiez admitted that age was not the motivating factor—he believes John Cawley got the job not because of his youth but because his father was Jack Cawley. Terwilliger and Kishbaugh both confirmed this. *See* Lewkowiez, Tr. 197-98 (Feb. 18, 1997), 83-85 (Feb. 19, 1997); Kishbaugh, Tr. 213, 241 (Feb. 18, 1997); Terwilliger, Tr. 85 (Feb. 19, 1997). A relatively brief time later, Leslie Fay closed the Indonesian plant and terminated John Cawley.

A few months after Lewkowiez's termination, in October 1992, Weinstein informed Lewkowiez that Leslie Fay was trying to find another position for him and would continue to do so. Cl's Ex. 31. It is not clear what Weinstein intended or what Lewkowiez perceived this statement to mean. Lewkowiez could not have put too much stock in it because, a month later, Lewkowiez requested and Leslie Fay provided a letter of recommendation to him. Lewkowiez was unemployed for approximately eight months. In February 1993, Lewkowiez was hired as the quality control director for a company in Florida, where he remains today. However, shortly after securing that position, Lewkowiez received an offer from Liz Claiborne in New Jersey which would have paid him a higher annual salary than what he was receiving at Leslie Fay. Lewkowiez, Tr. 101 (May 28, 1997). After assessing the financial pros and cons, including the tax ramifications, of moving back to the northeast, Lewkowiez declined the Liz Claiborne offer.

Lewkowiez maintains that he should have been offered reemployment for the positions made available to Farrell, Marino, and Ochs. Lewkowiez nonetheless contends that he was qualified for Ochs' position in light of Lewkowiez performance of production functions at other companies and for his current employer, a position which requires visits to

factories around the world. Lewkowiez, Tr. 74-75 (May 28, 1997). Lewkowiez recognized, however, that Ochs had more qualifications, having been employed in one of the major apparel companies in the United States as a chief of production in charge of worldwide sourcing.

Keith Farrell (born May 16, 1957, age 37) was one of the employees hired by Ochs in April 1994. Ochs named Farrell Director of Quality Control, the same title which Lewkowiez had held. Connors testified that Farrell was recruited for two reasons: (i) because of Ochs' prior relationship with Farrell at Liz Claiborne and (ii) because of Ochs' belief that Farrell, who had worked at J.C. Penney, could assist Leslie Fay in obtaining that company as a client. Connors, Tr. 367-69 (May 29, 1997). Notwithstanding the like title, Farrell's position was actually quite different from Lewkowiez's. Farrell's position was more along the lines of an examining supervisor's, like Michaud's, rather than like Lewkowiez's, who was more focused on quality control in the manufacturing stages. Cawley, Tr. 24-25, 30 (Feb. 18, 1997). Ms. Kishbaugh confirmed this. Notwithstanding that Lewkowiez was probably qualified for the position that Farrell held, he never indicated a desire to perform lesser functions when he was laid off or at any time thereafter. Phil Marino, to whose job Lewkowiez says he was entitled, later replaced Farrell when Marino's factory did not reopen after the 1994 union strike.

2. *Falbaum*

Plaintiff Falbaum was hired by Leslie Fay in March 1977 (at age 38) and was terminated on August 7, 1992 (at age 53) as part of an RIF. At the time he was terminated, Falbaum was the Director of Physical Distribution for the Dress Division working out of the Laflin facility. Falbaum, Tr. 307 (Nov. 24, 1995). He was responsible for the movement of goods, which entailed directing operations at the warehousing and distribution center. Because Falbaum executed an enforceable release, his only surviving claim is for discriminatory failure to rehire.

When Leslie Fay terminated Falbaum, Weinstein volunteered that Falbaum would be considered for future positions within Leslie Fay and further that Weinstein would try to get Falbaum a job elsewhere. In response to a letter from Falbaum expressing dissatisfaction with the severance benefit proposed by Leslie Fay, Weinstein wrote, "Incidentally, we have been trying to find a position for you and we will continue to do so." Ex. 14.

There were two available factory manager positions in 1993 for which Falbaum was qualified. In early 1993, Sassco had an opening to run its warehouse facility in Secaucus. Lester Schreiber, the Chief Executive Officer of Sassco, testified that Falbaum never applied for the position, but, in any event, Schreiber was not interested in hiring him. Several years earlier, in 1990, Falbaum had applied for a position with Sassco. Schreiber interviewed him, forming the impression that Falbaum wasn't completely effective in dealing with subordinates. Schreiber says that Falbaum seemed preoccupied with his ability to hire and fire rather than with his major function, distribution. Schreiber also says his impressions were confirmed by Terwilliger, testimony which I also believe, notwithstanding Terwilliger's attempt to dance around this issue.

Terwilliger's assessment of Falbaum's difficulties with his subordinates was corroborated by an undated memorandum from Sandy Mazur to Falbaum, a copy of which Mazur had supplied for Falbaum's personnel file. (Mazur retired at the end of 1991, so the memorandum has to have been sent no later than that time.) The memorandum is quite critical of Falbaum, recognizing that while he worked long hours, he was not managing the department. Mazur stated that "Your people not only have no respect for you, but every one of the supervisors feel you are of little or no help to them. To speak to you of a problem results in no action. You don't really know what is going on in the department. You don't know how to solve problems. . . ." Debtors' Ex. J.

The accuracy of Falbaum's account of his application to Sassco in early 1993 is questionable. His suggestion that he did not get the job in 1993 because of his age is equally problematic. Falbaum testified on direct examination that he had heard through the "grapevine" that Sassco needed a factory manager so he mailed a resume and attempted to reach Schreiber by telephone. He later identified his "grapevine" as Ron Kalman, the director of corporate engineering. Falbaum described Kalman's job as encompassing visits to all of Leslie Fay's facilities, giving Kalman a pulse on what the company's hiring needs were. However, when pressed on cross examination about whether he was perhaps mistaken about how he heard of the 1993 Sassco position in light of the fact that Kalman had actually left the company two years earlier, Falbaum steadfastly held to his story. He said that notwithstanding Kalman's departure, Kalman was still "in the know," an unlikely proposition at best. Falbaum also testified that after he had sent Schreiber his resume in 1993 and had not heard from Sassco, Kalman informed him that Sassco "would not touch [him] with a ten foot pole" because "he was Leslie Fay." Falbaum explained that Sassco's principals were untrusting of Leslie Fay people. (Even if true, this has nothing to do with age discrimination).

Falbaum's reaction to the critical memorandum from Mazur was also less than credible. He testified that he "probably" never received it from Mazur and that Mazur always sent "love notes" like that to people, so that it shouldn't be given too much weight. Terwilliger attempted to stand the memorandum on its head, suggesting that the import of it was that Mazur was concerned that Falbaum was working too hard. This, as much as anything Terwilliger said, illustrated his willingness to shade his testimony to achieve an objective, leading me yet again to question his truthfulness. Significantly, Falbaum admitted that he left his post-Leslie Fay position with Maidenform because they were unhappy with how he dealt with labor problems, lending substance to Schreiber's

instinct about not hiring Falbaum for Sassco and to his testimony about what Terwilliger had said regarding Falbaum.[7]

The second opening for a factory manager position became available when Galen Erickson, who had been brought in over Falbaum, resigned from his position in August 1993. The debtors concede that Falbaum had the experience for this position but, rather than rehiring Falbaum (age 54), Leslie Fay transferred an existing employee, Robert Sink (age 49), from its Hanover facility. Cawley, Tr. 162 (May 28, 1997). Sink, who was five years younger than Falbaum, was not in distribution before his transfer. Terwilliger testified that Leslie Fay made it a point to move people internally to different jobs and operations based upon their broad understanding of the apparel industry, and Sink's transfer is consistent with this policy. *See* Terwilliger, Tr. 137-38 (Feb. 19, 1997). Sink was terminated in October 1995, and Granahan then (age 40), promoted from within, is now running the facility. Granahan had worked for Falbaum twice and was trained in part by Falbaum.

### 3. *Gill*

Anthony Gill was hired by Leslie Fay in the summer of 1978 (at age 42) and terminated June 6, 1992 (at age 57). Gill, Tr. 165 (Nov. 27, 1995). At the time of his termination, Gill was a Production Manager at Albert Nipon, then a division of Leslie Fay. He reported to Mazur, the Vice President of Manufacturing. Gill's position was eliminated when Leslie Fay consolidated Albert Nipon with three other divisions and retained the Production Manager of those divisions, who had more seniority than Gill. Cawley, Tr. 152-56 (May 28, 1997); Gill, Tr. 425 (May 29, 1997). (One year later, the combined division was closed.)

Gill's function was domestic "sourcing," which meant that he searched out independent contractor factories to produce

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[7] As it so happens, Schreiber hired an individual for the position who was the same age as Falbaum. Schreiber, Tr. 92 (Feb. 18, 1997).

a quality product and then priced the garment. Gill was "exceptionally" qualified and a valued employee at Leslie Fay. Cawley, Tr. 147 (May 28, 1997), Cl's Ex. 41. In January 1992, he had been given a raise.

Gill's qualifications were not limited to production, for Gill had spent some time in the specialty needle and fusing department which he had successfully revamped. Gill, Tr. 232 (May 28, 1997); Cawley, Tr. 147 (May 28, 1997). In 1988 or 1989, Gill was transferred from the specialty department because his job there had been completed. No one was hired to replace him because all the new methodology was in place. Gill, Tr. 433 (May 29, 1997). The supervisors whom he had overseen remained in their positions when Gill was transferred to the Nipon division; those supervisors were later terminated as Leslie Fay downsized. Tr. 429, 431, 435 (May 29, 1997).

As mentioned above, Gill has waived any claim for wrongful termination. Thus his employment discrimination claims subsist only to the extent that he was discriminated against in his attempt or right, if any, to be rehired.[8] Gill, who is quite ill, has not secured any comparable position to those which he held at Leslie Fay; rather, he has done part-time freelance domestic sourcing.

Gill testified that when he was terminated from his production manager position in June 1992, Cawley assured him that if any position became available, Gill would be considered. Cawley denies promising Gill future employment. About a week after he was terminated, Gill spoke with Mazur, whom he says also assured him that if any subsequent posi-

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[8] In the Claimants' *reply* post-trial memorandum, Gill attempts to reargue the merits of his claim that the release he signed violated mandatory provisions of the ADEA in light of facts which he says were developed during the trial on the merits of his discriminatory failure to rehire claim. However, his request is patently improper given that I entered an order two years ago dismissing those very claims. An attempt at a new trial would have to be made via the appropriate Federal Rule of Bankruptcy Procedure. Even assuming Gill's request were not procedurally improper, Silvi's testimony does not lead me to question the facts as I have already found them.

tion became available, Gill would be considered. Terwilliger, who was still Leslie Fay's Vice President of Human Resources at the time, informed Gill that something should be able to be done for him. About a month later, Mazur then informed Gill that he was sorry but "they want you out." Since then, Gill has communicated periodically with Mazur. Later in 1992, Mazur suggested that Gill send in his resume again, although Mazur did not indicate that any positions were available. Cawley wrote a letter of recommendation for Gill on November 5, 1992. Ex. 41.

Nine months after Gill was terminated (and a few months after Mazur suggested he send in another resume) Howard Horder, a Human Resources Administrator at Leslie Fay's New York offices, placed an advertisement seeking a Production Manager for the Spitalnik division in the January 12, 1993 edition of *Women's Wear Daily*, Cl's Ex. 35; D's Ex. K. Gill testified that he responded to the Spitalnik advertisement twice—first by mailing an application in January 1993 and then by faxing a copy of his resume in March 1993. Cl's Ex. 35, 36, 37; Gill, Tr. 493, 511 (June 9, 1997).

Although he responded to the advertisement, Gill did not communicate with Cawley, Silvi, or Mazur to let them know that he had applied for the Spitalnik position or to seek any assistance in obtaining the position. On cross-examination, Gill admitted that he could not remember when he sent the resume in response to the Spitalnik advertisement, but he was sure that he had sent two copies. Gill also candidly admitted that he was terrible with dates. He suggests that the January 12, 1993, date handwritten at the top of the photocopy of the Spitalnik ad that he retained with his records proves that he sent the resume on that date. However, Mrs. Gill contradicted him, testifying that they always received their copy of *Women's Wear Daily* the day after it was published, so that the handwritten date at the top represents the date of the ad. L. Gill, Tr. 539 (June 9, 1997). Gill's (or his wife's) notes indicate that he mailed a resume on February 14, 1993, and faxed one on March 11, 1993.

The relevance of when Gill mailed his resume lies in the fact that Horder filled the position on January 27, 1993, in all likelihood before Gill even applied for it. Moreover, Horder testified that he meticulously reviewed all responses, numbered and coded them, and put them in a single folder. He was sure that he did not receive an application from Gill in response to the Spitalnik advertisement. Horder, Tr. 154 (Feb. 18, 1997). The person Horder hired was David Gerstein (age 52), who is six years younger than Gill. Gerstein eventually was terminated when the Spitalnik division shut down operations in April 1995. Horder and most of the other employees were also terminated.

Gill testified that he should have been hired for Ochs' position but he admitted he had no experience in sourcing imports. Tr. 528. In suggesting that he should have gotten Guarilia's position, Gill admits that Guarilia is the same age as he, but testified that "ability should be valued." He also suggests that he should have been asked to fill the Director of Distribution position which was given to Granahan, although he admits that he never worked in distribution at Leslie Fay and did not know if they knew if he had experience in that area from previous employment. Gill, Tr. 439 (May 29, 1997).

Gill maintains that he should have been offered yet other positions opening up at Leslie Fay after his termination. Cl's Exs. 15 , 57, 67, 44, 56, 45, 43, 47, 49, 48; Gill, Tr. 439-40, 445-46 (May 29, 1997). The positions included several available Vice President of Manufacturing positions filled by Dan Liedy (age 49) on December 20, 1993; Don Cilley (age 48) on January 10, 1994; Katherine Bini (age 49) on December 20, 1993; and Wilhelm Meyer (age 58) on March 1, 1994. (Remember that these were some of the positions which Ochs filled from among his former co-workers at Liz Claiborne.) Gill also submits that he should have been hired for a Director of Manufacturing position opening up on December 27, 1993, but filled by Amr Fahmy (age 31), a Production Supervisor position opening up on June 27, 1994 and filled by Richard Hastings (age 57), and a trim buying position filled

on January 1, 1994 by Mary Louise Sierchio (age 42). Gill admits, however, that he did not apply for any of these positions which were filled by Don Och's people well after Gill was let go.

### 4. *Kishbaugh*

Kishbaugh was hired in November 1976 (at age 36) and terminated on November 12, 1993 (at age 53). Throughout his tenure, Kishbaugh was a Leslie Fay Factory Manager and spent time at more than one of Leslie Fay's dress factories. At the time of his termination, Kishbaugh was the Factory Manager for Leslie Fay's Downing Garment factory in Wilkes-Barre, Pennsylvania. Kishbaugh alleges that, at the time of his termination, younger factory managers were treated more favorably. Since his termination, Kishbaugh has been either unemployed or employed only part-time.

As mentioned earlier, in August 1993 Leslie Fay informed Kishbaugh that the Pennsylvania factories would be closing and that certain of their personnel would be transferred up to Route 315; that no factory managers would be transferred; and that his factory would be the first to close. Kishbaugh, Tr. 213 (Feb. 18, 1997). Kishbaugh, although unhappy with his termination, accepted his plight.

When Kishbaugh learned that McGavin had been transferred notwithstanding the closing of his factory, Kishbaugh sent an application to Silvi "for the position of Factory Manager of Pittston/Andy Fashions." Cl's Ex. 5; Silvi, Tr. 39-41 (Feb. 18, 1997). Silvi did not respond to Kishbaugh because no factory manager jobs were available; McGavin was running the facility for which Kishbaugh had applied. Kishbaugh maintains that he nonetheless should have been offered the Factory Manager position at Pittston/Andy Fashion because he was more qualified and experienced than McGavin. Ms. Kishbaugh testified that, as time study engineer, she would review monthly reports regarding performance at the factories. She said that her husband's "erosion values" were about a third better than Marino's and Bachkosky's but, she admit-

ted, only sometimes slightly better than McGavin's. She testified that erosion values measured the efficiency of the factory, and that in 1993 and 1994, Bachkosky (who was 42 and employed at Leslie Fay longer than any other factory manager) consistently went over costs, his erosion values were always unacceptable, and he was not complying with the specifications issued by the engineering department.[9] Whatever the relative merits were of the six factory managers, individual performance was not terribly relevant for, as Cawley testified, all the factories were operating at a considerable loss and no one was performing markedly better than another. (It was for this very reason that Leslie Fay studied the unit production system—to see if domestic operations could be made profitable where they were uniformly unprofitable.)

Kishbaugh also maintains that he should have been given the job in the examining department that Phil Marino obtained in 1994. Kishbaugh had had experience in examining and thus could have filled Marino's position, although he admitted he did not know if he had told that to anyone at Leslie Fay. The cover letter to his resume indicated only that he was looking for the factory manager position. Cl.'s Ex. 5.

Although Kishbaugh signed a release in the form that some of the other plaintiffs signed and received severance benefits (which he has not returned), his release did not have appended to it a list informing him of the positions and ages of other employees terminated in connection with the reduc-

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[9] According to Ms. Kishbaugh, Bachkosky's problems were not limited to his job performance, for he would also use foul language and make lewd sexual remarks to female employees. After Ricky Fashions, Bachkosky's factory, moved up to Route 315, someone must have complained to Cawley because Cawley reprimanded Bachkosky. N. Kishbaugh, Tr. 743 (June 23, 1997). Notwithstanding Cawley's reprimand, Bachkosky's behavior continued. Nonetheless, however, the only female plaintiff—Michaud—did not report to Bachkosky and did not work in his factory. Nor did Michaud testify that she had ever had a run-in with Bachkosky. In any event, the record reflects that Cawley reprimanded Bachkosky and that no one else informed Cawley that Bachkosky's alleged behavior continued.

tion in force, an unambiguous requirement for a knowing and voluntary release of age discrimination claims under the Older Workers Benefit Protection Act of 1990.

*See* D's Ex. A.

### 5. *Terwilliger*

Raymond Terwilliger was hired by Leslie Fay in February 1978 (at age 30) and was terminated by Leslie Fay's President, Alan Golub, on August 10, 1992 (at age 44). Until January 1981, he had been the Director of Personnel for Leslie Fay's Pennsylvania operations. In 1981 he was promoted to Vice President of Human Resources for all of Leslie Fay. Terwilliger received a substantial merit increase in 1992 and his credentials are not questioned by Leslie Fay.

Terwilliger claims that his termination was in retaliation for his speaking up about the discriminatory hiring and firing practices at Leslie Fay. However, he also testified that he told Golub at the time that Golub terminated him that he was being terminated because of his ongoing feud with Paul Polishan, Leslie Fay's Chief Financial Officer (whom Terwilliger believed was not competent). Terwilliger said that Golub announced that the termination decision was final. Vallecorse confirmed that the strain with Polishan was behind the termination. Vallecorse, Dep. Tr. 15-16 (Ex. 76)(July 5. 1995). In any event, as mentioned above, Terwilliger executed a release in return for substantial benefits for all claims resulting from alleged employment discrimination arising out of his employment and termination. Thus, only a subsequent application or right, if any, to reemployment may form the basis for recovery.

A few weeks after Terwilliger was terminated, but before he had executed a release, he called Gordon to talk about his concern that he might not find future employment before his severance ran out. Terwilliger, Tr. 226 (Nov. 27, 1995). He also may have indicated a desire to remain with Leslie Fay. *See id.* Gordon, like Golub, informed Terwilliger that he believed the decision was final. Terwilliger, Tr. 228 (Nov. 27,

1995). Terwilliger asked what would happen if he did not find another position before he exhausted his severance pay, and Gordon told him to take up the issue with Golub or John Pomerantz, Leslie Fay's Chief Executive Officer. Terwilliger then approached Golub, who assured Terwilliger that he would have "no problem" and that "Leslie Fay will stand behind you." Terwilliger says Golub mentioned that he would take money out of his own pocket if necessary. Tr. 227-28. Terwilliger testified that, as a result of these conversations, the parties put a provision into the release (which he later signed and I found valid) allowing Leslie Fay to consider paying Terwilliger additional severance "at Leslie Fay's sole option." Tr. 228, 261. Notably, nothing was put into the release agreement about future employment, consistent with the version of this story told by Terwilliger that Gordon and Golub told him that the decision to terminate was final.

Terwilliger planned to find a new job, but the revelation of Leslie Fay's accounting irregularities made it difficult for a long-time Leslie Fay executive to find a new position. So, on April 23, 1993, Terwilliger called Gordon to ask for additional severance benefits. Terwilliger testified that Gordon apparently believed that Terwilliger wrote to the media regarding Leslie Fay's accounting irregularities. Terwilliger says he denied authorship of any letter but announced that he "felt vindicated [by revelation of accounting irregularities during Polishan's tenure as Chief Financial Officer] but could not wait to be as far away from Leslie Fay for the rest of [his] life as possible." Terwilliger, Tr. 235 (Nov. 27, 1995). Gordon suggested that Terwilliger "go to hell." *Id.* Terwilliger then informed Gordon that he felt he was being backed into a corner, and Gordon repeated his instructions. Terwilliger, Tr. 102-104 (Feb. 19, 1997). Terwilliger replied that he was then forced "to do what he had to do" given his financial insecurity as a result of Leslie Fay's not keeping its agreement to consider paying him additional severance. Gordon took that as a threat, with the conversation ending on a sour note.

Subsequently, and notably after I found Terwilliger's termination claims barred by the release he signed, Terwilliger attributed a new purpose to his call to Gordon, that of reinstatement at Leslie Fay. Given Terwilliger's much earlier testimony that during this conversation he told Gordon that he could not wait to "be as far away from Leslie Fay as possible" I find it more likely that Terwilliger did not seek reinstatement as he now contends. Gordon corroborated Terwilliger's first version of the events and denied that Terwilliger "applied" for a position at Leslie Fay at this time or was looking for anything other than additional severance.

On cross-examination, Terwilliger said that he believes that Leslie Fay failed to rehire him in retaliation for a conversation that Terwilliger had had with Thrope (Leslie Fay's outside counsel) during which Terwilliger told Thrope that it was management's policy to target old people for termination and sprinkle in young people. Terwilliger also said that Thrope threatened him, suggesting that if he persisted in accusing Leslie Fay of employment discrimination, Leslie Fay would make things very difficult for him. Thrope vehemently denied ever threatening Terwilliger, a long time friend. Thrope quite credibly testified that the purpose of his meeting with Terwilliger was only to suggest he get on with his life, put Leslie Fay behind him, and stop asking for additional severance. Thrope testified that discrimination was never implicitly or explicitly a part of their conversation.

It was readily apparent from Terwilliger's testimony that the April 23 conversation with Gordon did not include any implicit or explicit reference to age discrimination. Notably, it was not until *after* this conversation, in which it became clear that Leslie Fay had no present intention of paying Terwilliger additional severance, that Terwilliger filed his EEOC complaint alleging the company practiced illegal age discrimination.

Terwilliger's contention that he reapplied for a position with Leslie Fay in 1995 further illustrates his propensity to bend facts to suit his purposes. Terwilliger's purported

"application" occurred when he ran into John Pomerantz while waiting for an elevator during discovery proceedings. By this time, Terwilliger had publicly accused Pomerantz of personal involvement in fraud at Leslie Fay and had suggested that Pomerantz ought be removed from management. Nonetheless, Terwilliger explains that he had (and still has) a great fondness for Pomerantz, and told him he would like to come back to Leslie Fay. He testified that he said to Pomerantz something like, "if you had only listened to me, none of this would have happened." Terwilliger testified that he then said that he would like to come back to Leslie Fay and help. Pomerantz responded with an obscenity and called Terwilliger a liar. I do not find credible Terwilliger's testimony that this encounter constituted an "application" for employment, nor is there any indication that age discrimination was a motivating factor behind Pomerantz's hostility.

As to whether other positions were available for which Terwilliger would be qualified, the answer to that question is probably yes. When Leslie Fay terminated Terwilliger, Roger Vallecorse, who is ten years older than Terwilliger and who had actually been brought in above Terwilliger in late 1991, took over his functions. When Vallecorse departed voluntarily in early 1993, he was replaced briefly by Rochelle Geller (age 41), who was promoted from her position as Director of Human Resources. In the spring of 1993, Gordon informed Michael Babcock, the then President of Leslie Fay, that he would be retiring at the end of the year. As indicated earlier in this decision, Leslie Fay decided to consolidate several functions, merging in one person the role of general counsel and director of human resources, among other things. Leslie Fay recruited Connors, a lawyer, for the top job. She in turn recruited Susanne Tully (age 46) from Liz Claiborne and gave her the title of Director of Human Resources. The two had worked together at Liz Claiborne for close to ten years. When Connors left, Tully, a non-lawyer, replaced her as Vice President of Human Resources in September 1995. Other lesser but related positions were also apparently available—in

November 1992, Leslie Fay hired Howard Horder (age 32) as Human Resource Administrator. In 1993, Leslie Fay also asked Vallecorse (age 58) to return for a special assignment, interviewing employees at the Hanover facility after the discovery of the financial improprieties. Tr. 564 (June 9, 1997); 921 (June 23, 1997); Exs. 1, 76 pp. 82-84. Terwilliger was qualified for at least some of these positions becoming available after his termination.

Since his termination from Leslie Fay, Terwilliger held various part-time jobs until he formed his own consulting business, which has done fairly well.

### 6. *Michaud*

Elizabeth Michaud was employed by Leslie Fay at the Laflin facility as an Examining Supervisor. Her employment ceased as of December 31, 1992, when she retired. Michaud was first hired by Leslie Fay in 1947. During the next three decades, she voluntarily departed from and returned to the company a number of times in different positions. On February 17, 1979, she was rehired (at age 48) as Examining Supervisor, a position she held until she retired at age 61. During the course of her employment, Michaud talked from time to time about her desire to retire.

Michaud suffers from diabetes and hypertension but there is no dispute that she was qualified for and able to perform her position. She had also received commendations from her supervisors. Michaud was herself a supervisor, responsible for the examiners who inspected finished garments in the distribution center in order to catch quality problems that were not detected at the manufacturing stage by quality control employees. Michaud, Tr. 823 (June 23, 1997); Weinstein, Tr. 306-08 (May 29, 1997). During her tenure she devised a tagging system which expedited the quality control–repair function through the use of identifiable color-coded stickers to show quickly and easily where repairs needed to be made. Ex. 71.

Michaud's disability required her to eat lunch every day on time, have access to fresh air, not carry heavy materials, and sit periodically. Leslie Fay accommodated her disability by providing her with an air-conditioned office; she also had access to a service porter to move garments around. Part of the examining function was standing and moving garments from rack to rack. Leslie Fay told her to sit and let the examiners bring questions to her. Her supervisor told her to ask the porter to carry the garments.

Throughout most of the period that Michaud was employed as Examining Supervisor, she reported to plaintiff Lewkowiez. Her relationship with Lewkowiez was a warm one. He testified that he never knew of her disability, that she often carried garments, without complaint, and that she allowed his frequent interruptions of her lunch hour, without objection.

As mentioned earlier, in August 1992, during the transition to the new audit system, Leslie Fay eliminated Lewkowiez's position. Weinstein, Tr. 278 (May 29, 1997); Granahan, Tr. 194 (May 28, 1997). Michaud was very uncooperative in implementing the new audit system. Granahan, Tr. 194 (May 28, 1997). Granahan testified that he had to speak with her two or three times about her recalcitrance in following the new procedure. He said that he recalled working with her in the past, before he was her supervisor, and that there was no compromise with Michaud. Things were done her way or no way—"you did whatever Betty wanted; that is the way things got done." Granahan testified that Michaud was combative in many situations.

Joseph Guarilia (age 57), a pressing supervisor who had been hired in April 1991, also had an aggressive personality, leading the two of them to frequent clashes. Weinstein, Tr. 292 (May 29, 1997); Michaud Tr. 834 (June 23, 1997). Guarilia moved quickly from being a presser to the supervisor of pressing. Granahan, Tr. 189 (May 28, 1997); Lewkowiez, Tr. 65 (May 28, 1997). Michaud perceived that Guarilia, undermined her by shipping garments without having them repaired as per Michaud's instruction. She complained to Lewkowiez

that Guarilia was removing the stickers off garments and then shipping them even though she deemed them not shippable, which was contrary to Lewkowiez's orders and company policy. Lewkowiez, Tr. 65-66 (May 28, 1997). Lewkowiez reprimanded Guarilia, who continued to ship what Michaud had determined were inferior garments. Lewkowiez complained to Galen Erickson, the shipping director, but was told that the goods had to go because they had been prebilled. Lewkowiez, Tr. 66, 69-70 (May 28, 1997).

Lewkowiez never complained to Cawley, his supervisor, about Guardia's alleged shipment of inferior garments, but in any event, Cawley said he was not surprised to learn of it. He said that sometimes it was a business decision whether to ship the customer or repair the goods, and it was always a management decision. Cawley, Tr. 145. When Weinstein was asked whether Guarilia would have been promoted had Weinstein known that Guarilia was shipping "inferior garments," Weinstein testified that he would have looked into the situation, but corroborated Cawley's testimony characterizing quality control as "art not science;" there were always differences of opinion as to what is passing and what is not. Weinstein, Tr. 311 (May 29, 1997). Weinstein, who was in the Laflin distribution center every Friday, testified that Lewkowiez had not complained to him of Guarilia's alleged shipping of inferior garments. *Id.* at 311-12.

In late 1991 and 1992, Michaud testified, she started to feel very sick and depressed. She reports that after Guarilia came on board her blood sugar level increased and her blood pressure skyrocketed, although she offers no medical proof of her assertions.[10] As mentioned, during the onset of the new audit

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[10] Michaud called Dr. Stanley Portnow, a psychiatrist, to testify as to her disability. Dr. Portnow first examined Michaud a few days before the trial, and had never met her before. Portnow did not compare Michaud's medical reports before Guarilia became her supervisor with reports on her medical condition after he became her supervisor, although Michaud had seen doctors during both periods. Portnow confined his testimony to what she had told him about her condition and what she had

system, in August 1992, Lewkowiez's position was eliminated. At the time, Michaud asked Lewkowiez if she could be transferred out of the department, but he told her it was out of his hands.

After Lewkowiez's departure, Leslie Fay promoted Guarilia to the position of Manager of the Exam and Repair Department, a position directly above Michaud. Gurailia now reported to the production person, Granahan, who in turn reported to Cawley. Guarilia had only been with Leslie Fay just over a year. Michaud, although considered for the promotion, was passed over. Michaud testified that she should have been given the promotion because she had been with Leslie Fay longer and had better qualifications. She says she even had to teach Guarilia various portions of the examining function because his prior management experience had been in managing the manufacture of shoes, not dresses. Weinstein testified that it was Erickson who had been Guarilia's manager and who decided to promote Guarilia; Weinstein had confidence in Erickson's decision. Michaud contends that she did not get the manager position because she was a woman. She offers the testimony of Nina Kishbaugh who heard Mr. Lynne Williams, Leslie Fay's Chief Engineer, say that "as long as present management was in control of Leslie Fay, there would never be another woman manager." N. Kishbaugh, Tr. 754-57 (June 23, 1997). Ms. Kishbaugh testified that qualified women were given the title of "Sewing Section Supervisor" while men in the same position were titled, "Plant Manager Trainee," although their functions were the same. Ms. Kishbaugh recounted that Leslie Fay had a woman

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told him about how she was feeling. He did not offer a medical opinion on what Guarilia's hostility, if true, could have done to a person with diabetes and hypertension. He also offered no link between her depression and Guarilia's treatment. For all those reasons I do not believe Dr. Portnow's testimony carries any great weight. Michaud herself testified as to her condition, that is, that both her blood pressure and blood sugar level increased and that Guarilia's treatment depressed her. Because the evidence is in the record through Michaud, there is no need for me to rely on Dr. Portnow's report of the same information.

supervisor named Ann Krupa, a graduate of the Fashion Institute of Technology, who had had more training than any male plant manager but was never given the opportunity to be manager. *Id.*

In response, Leslie Fay offers the names of several women in positions of authority, some of whom were hired after Michaud filed her proof of claim against the estate. *See* D's Ex. D (Joan Ruby, Vice President/General Counsel); Cl.'s Ex 15 (Kathryn Connors, Human Resources, hired Aug. 1, 1993; Susanne Tully, Human Resources, hired Feb. 16, 1994); Cl.'s Ex. 50 (Tina Adams, Director of Manufacturing, hired Sept. 1991); Ex. 51 (Michele Israel, Vice President, hired Mar. 1994); and Ex. 52 (Annette Mathieu, Vice President, hired Apr. 1994).

Granahan and Weinstein both testified that Guarilia, rather than Michaud, was promoted because he had had substantial experience as a factory operations manager, albeit in a shoe factory. Granahan, Tr. 187, 189 (May 28, 1997); Weinstein, Tr. 291 (May 29, 1997). Granahan admitted that while Michaud had the technical skills needed for to her own position, those skills were less important for the operations management position into which Guarilia was promoted. Granahan explained that Guarilia's qualifications for manager "far exceeded" Michaud's—he had the people skills, negotiating experience, ability to take orders, and ability to delegate responsibility that are necessary as a manager; and he had been an operations manager for over thirty years. Granahan, Tr. 189 (May 28, 1997); *see also* Weinstein, Tr. 291 (May 29, 1997). Guarilia knew how to negotiate and accomplish what had to be done, said Granahan, and he told Michaud that Guarilia was promoted because Guarilia possessed the proper managerial skills. Michaud testified that after Guarilia became her supervisor he wanted fewer correction stickers on the garments: "Joe did not want us to spend a lot of time to examine them, but the factories wanted more information on the garments that were going back." She felt slighted that the system which she designed was not being employed as she

intended. Indeed Michaud informed Cawley, the Vice President of Manufacturing who was responsible for the Laflin distribution center, that Guarilia "was cheating the paying customers" by shipping inferior garments. After Cawley reported this call to Granahan, in what Michaud remembered as a three hour meeting both Guarilia and Granahan reprimanded her for going outside her "line of authority" to Cawley to complain that bad quality garments were being pushed through without examination. She testified that both Granahan and Guarilia forbid her from "telling anybody about anything," instructing her that in the future, she was to bring her problems to Guarilia and then if still unresolved to Granahan. Tr. 853-54.

As the 1992 RIFS were underway, Michaud asked Guarilia if she could be included in the layoffs. Guarilia transmitted her request to his supervisors, Granahan and Erickson, who rejected it because Michaud's position was not being eliminated. For a reason that was not apparent to me, Michaud was upset with Guarilia for telling Granahan of her request.

In the fall of 1992, Michaud testified, Guarilia often screamed at her. She described Guarilia standing with his hands on his hips, gritting his teeth, watching her. If he saw her limp or wince, she says he would say, "If you're too damn sick, why don't you get the hell out[?]" Michaud testified that Guarilia stated several times over a period of a few months that she should leave if she was "so damn sick." Michaud, Tr. 844-45.

Michaud also testified that after Guarilia became her supervisor, she was not allowed to use her air-conditioned office except during lunch or a break. She testified that Guarilia forced her to write her reports standing up outside her office and that although Guarilia told her to ask the porter to carry garments for her, when the porter was not around, Guarilia laughed when he saw her struggling with garments. Michaud also said that Guarilia threatened to take the porter away, an assertion which does not square with her testimony that Guarilia told her to use the porter to transport dresses. Granahan

testified that Michaud never complained to him about having to stand or carry garments and that she never complained that Guarilia was threatening her or not accommodating her disability. Lewkowiez also testified that Michaud never complained about standing or carrying garments.

In support of her constructive discharge theory, Michaud complains that from "time to time" Guarilia and Granahan would interrupt her lunch hour for conferences. Michaud. Tr. 849 (June 23, 1997). In such instances, she testified, she would tell them that she needed a full lunch hour but they would talk to her about work anyway. Granahan admitted that he would sometimes talk with Michaud during her lunch hour, and that she would say she needed to eat. He says he responded that she should continue to eat; he never prevented her from eating, a point which Michaud never contradicted. Lewkowiez testified that he had never had any problem working with Michaud. Although she objected to Granahan's and Guarilia's interruptions of her lunch hour she equably tolerated Lewkowiez's frequent lunch hour interruptions and conferences. Lewkowiez, Tr. 86, 87 (May 28, 1997). Obviously, she was far more tolerant of those she liked than of those she didn't.

In one instance, Michaud testified, the women in the examining room were complaining to her that there was not enough space for them to work because there were too many dresses. Michaud baited Guarilia; rather than discussing the matter with him in private, in front of the women she asked Guarilia to find a way of getting more air in the work area for the examiners. Guarilia told her to "shut up," and go to her office. (Although he was her supervisor, in view of her disability, Michaud had the only available office, which was air conditioned; Guarilia stayed out on the floor.) At that point Guarilia slammed his hand on the desk, saying, "Do I have to beat you to understand that its [sic] what I say and not what you say?" Michaud. Tr. 844 (June 23, 1997).

Michaud testified that Guarilia would malign her in front of the examiners. He was not happy with the way the examiners

worked, the way Michaud would teach them, the amount of product they were getting out. She resented that Guarilia "pitted the girls" against her, which she felt was not right given that she had worked with many of the women for many years.

At some point Michaud called Granahan down to her office "to tell him about this whole thing, about how Joe slammed the desk and he upset [her] so badly many times." Granahan said he would get back to her, but never did. Michaud testified that she thinks she called Cawley twice, one time, as earlier mentioned, to tell him about Guarilia's pulling the stickers off the dresses, and another time to tell him that she "really couldn't stand to work for Joe anymore, it was ruining [her] health." Michaud, Tr. 853 (June 23, 1997). But Cawley testified that it never came to his attention from Michaud or otherwise that Guarilia was abusing Michaud. Granahan also testified that Michaud never told him that Guarilia was threatening her, yelling at her, or refusing to accommodate her medical needs. Michaud, Tr. 853; Granahan, Tr. 192-93 (May 28, 1997); Cawley, Tr. 139 (May 28, 1997). It is not clear what Michaud complained to Granahan about other than Guarilia slamming the desk. As for her complaints to Cawley, there is no inconsistency between her testimony and Cawley's because there is no indication that she complained about anything other than business disagreements, not mentioning harassment or Guardia's perceived refusal to accommodate her disability.

In the fall of 1992, Michaud received no raise. Granahan testified that she did not receive a raise because she was uncooperative in implementing the new audit system. He said he told her that she needed to improve her people skills, work better with other managers in other departments, and had to get the new audit system off the ground and rolling. Granahan, Tr. 205-06 (May 28, 1997). (Guarilia, despite his higher position, was paid less per week than Michaud, and, in fact, during Michaud's tenure, never earned as much as she.) Granahan, Tr. 192-93, 204-05 (May 28, 1997); D's Ex. O.

Granahan testified that one of the reasons why Michaud did not get the raise was her combativeness in too many situations, including the implementation of the new audit procedures. Michaud's own testimony demonstrates that many of the disagreements she had had with her supervisors related to performance issues and her perceived insubordination. For example, Michaud testified that in 1989 or 1990 she had had a harsh exchange with Paul Polishan, Leslie Fay's former Chief Financial Offer, because he directed her to include items in inventory that she did not think worthy of sale. Polishan ordered her to tell her staff to count the items and prepare them for sale. Michaud protested, explaining that she did not think anyone should have to work on such dirty items. Michaud had proven herself sufficiently tough that Polishan resorted to rather unbecoming behavior, insisting "You'll do it or I'll make your life hell." Michaud, Tr. 838 (June 23, 1997).

Michaud was both strong-willed and petty, at least as far as Guarilia was concerned; this was illustrated and when the parking spaces were changed. Although her new space was closer to the door than her old one, she says she was upset because she bad to walk over two car-lengths of gravel. (There is nothing in the record to suggest that she had any difficulty walking, particularly in physically undemanding conditions.) She complained to both Guarilia and Granahan. Her discomfiture was caused less by the gravel than by the fact that Guarilia's space was a "better" one than hers. Although her supervisors explained to her that the spaces had been randomly assigned, she was not mollified, apparently still perceiving her allotted space as a slight. Michaud, Tr. 882 (June 23, 1997).

Michaud testified that after she was denied a raise, in October 1992, she asked Cawley for a transfer, but he said he knew of nothing that was available. In December she also asked Silvi, who agreed that there was nothing available. Around that time, however, she discovered that she was eligible for early survivor social security benefits so she

informed Erickson that she was going to retire. At no time did Michaud tell any Leslie Fay manager that she wanted to retire because Guarilia was abusing her or refusing to accommodate her health problems. Michaud, Tr. 202-03 (June 23, 1997). Indeed, she participated in the planning of her retirement party and selected the memento she was to receive. Id. 204.

Since her retirement, Michaud has worked at a number of part-time jobs but has avoided positions that would increase her income level such that her survivor benefits would be reduced. Id. 862-64, 868-69. Michaud does not allege that she applied for future positions or that she was promised she would be considered for any future position.

II.

A. *Jurisdiction*

The claimants have repeatedly asserted that I lack jurisdiction to adjudicate their claims. Over the last two years they have also made several motions to withdraw the reference, all of which have been denied by the district court. I have previously ruled on the jurisdictional issue, finding I had core jurisdiction to adjudicate the claims because the plaintiffs filed proofs of claim against the estate. *See In re Leslie Fay Co., Inc.*, 181 B.R. 156, 160 (Bankr. S.D.N.Y. 1995) (citing *e.g.*, 28 U.S.C. § 157(b)(2)(B); *Langenkamp v. Culp*, 498 U.S. 42, 44 (1990); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 n.14 (1989); *Katchen v. Landy*, 382 U.S. 323, 337 (1966); *S.G. Phillips Constructors, Inc. v. City of Burlington (In re S.G. Phillips Constructors, Inc.)*, 45 F.3d 702 (2d Cir. 1995) (determinative factor as to the bankruptcy court's core jurisdiction to adjudicate city's claim was that the city filed a proof of claim).

The only ground upon which the claimants rely in contending that I lack jurisdiction is that because they have a right to a jury trial in the absence of bankruptcy, the proceeding must be conducted in the district court. They confine their argument to the following:

> The Debtors' Objections to Claimants' Proofs of Claims will require factual determinations by the Court with respect to the merits of such claims. Such factual and credibility determinations are the function of a jury. This is especially so in discrimination cases in which significant reliance upon circumstantial evidence is necessary as has been extensively noted by the Courts.

Joint Estimation Hearing Pre-Trial Order, Relief Prayed, ¶ A at 2-3 (May 19, 1997); Joint Pre-Trial Order, Issues of Law, ¶ A. at 36-37 (both briefs citing *Gallo v. Prudential Residential Servs.*, 22 F.3d 1219, 1224 (2d Cir. 1994)).

No one questions that an employee has an initial right to a jury trial for an employment discrimination claim. However, notwithstanding 28 U.S.C. § 626(c)(2), such a right is subject to waiver by the employee. *See Washington v. New York City Bd. of Estimate*, 709 F.2d 792 (2d Cir. 1983) (employee's failure to file request for jury trial within deadline waived employee's right to jury trial), *cert. denied*, 104 S. Ct. 537, 78 L.Ed. 2d 717 (1984). In the bankruptcy arena it has been held that an employee with a discrimination claim, just like many of the other claimants with jury trial rights, may waive that right by filing a proof of claim and thereby consenting to the claim's inclusion in the equitable reordering of a debtor's assets in the bankruptcy court. *See Wittes v. Interco Inc.*, 137 B.R. 328 (E.D. Mo. 1992) (Age Discrimination in Employment Act claims properly decided in bankruptcy court); *In re Interco Inc.*, 152 B.R. 273 (Bankr. E.D. Mo. 1993) (same).

Although the claimants do not argue that their claims constitute personal injury torts within the meaning of section 157(b)(2)(B), the issue is subject to some debate in the courts.[11] I need not add my voice to the controversy, however,

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[11] *See Priest v. Interco, Inc. (In re Interco)*, 135 B.R. 359, 361-62 (Bankr. E.D. Mo. 1991) (holding that personal injury exception should be construed narrowly so as not to include torts without physical injury); *accord Perino v. Cohen (In re Cohen)*, 107 B.R. 453 (S.D.N.Y. 1989) (personal injury within the meaning of 28 U.S.C. § 157 requires impairment beyond "mere shame and humiliation"); *In re Atron Inc.*, 172 B.R.

because the claimants have waived the issue. *See Adams v. Cumberland Farms, Inc.*, 86 F.3d 1146, No. 95-1736, 1996 WL 228537 (1st Cir. May 7, 1996), *cert. denied*, 117 S. Ct. 387, 136 L. Ed.2d 303 (1996). Subject matter jurisdiction is not lacking given that section 157(b)(2)(B) is not jurisdictional; it defines only what is core and not core. "The classification of a proceeding as core or non-core does not determine the jurisdiction of a bankruptcy court, but instead relates to a determination of whether the court may enter a final order or judgment or whether it may only issue findings of fact and conclusions of law upon which the district court enters a final order upon *de novo* review." *In re Wefco*, 97 B.R. 749, 751 (E.D.N.Y. 1989). Bankruptcy courts retain

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541, 544-45 (Bankr. W.D. Mi. 1994) ("While not minimizing the emotional pain characteristic of job loss, the Claimant in the present case simply does not allege that his emotional suffering reached the level of a personal injury tort. . . . We are unwilling to adopt the broad exception to bankruptcy court jurisdiction urged by Claimant and thus open the door to a mass exodus of the claims allowance process to the district court. . . ."); *see also Siewert v. Christy (In re Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey)*, 194 B.R. 728, 734 (S.D.N.Y. 1995) (emotional damages, while not inconsequential, are not sufficient to transfer a business tort into a personal injury tort). *cf. Bertholet v. Harman*, 126 B.R. 413, 416 (Bankr. D. N.H. 1991) (in *debtor's* adversary proceeding against bankruptcy trustee for damage to debtor's principal, court held that plaintiff's contemplated expert testimony regarding plaintiffs fatigue and anxiety/stress was not the gravamen of the complaint and therefore not subject to 28 U.S.C. § 157(a)(5)).

*But cf. Thomas v. Adams (In re Gary Brew Enters. Ltd.)*, 198 B.R. 616 (Bankr. S.D. Cal. 1996) (Peterson, C.J.) (concluding that racial discrimination claim was in the nature of a "personal injury tort" necessitating trial in the district court); *see also Williamson v. Patterson (In re Patterson)*, 150 B.R. 367, 368 (E.D. Va. 1993); *cf. Boyer v. Balanoff (In re Boyer)*, 93 B.R. 313 (Bankr. N.D.N.Y. 1988) (Gerling, J.) (in *debtor's* adversary proceeding against third parties, bankruptcy court had no jurisdiction because the debtor's discrimination claims were properly characterized as "personal injury tort" claims within the meaning of 28 U.S.C. § 157(b)(5)); *Smith v. New York State Higher Education Servs. Corp. (In re Smith)*, 95 B.R. 286, 290, 291 (Bankr. N.D.N.Y. 1988) (same); *see also Hansen v. Borough of Seaside Park (In re Hansen)*, 164 B.R. 482, 483-84, 485-86 (D. N.J. 1994) (no "subject matter" jurisdiction).

jurisdiction over non-core matters, and further, parties may waive their right to *de novo* review by failing to assert that an action involving them is non-core. *Men's Sportswear, Inc. v. Sasson Jeans, Inc. (In re Men's Sportswear, Inc.*, 834 F.2d 1134, 1137-38 (2d Cir. 1987) (citing 28 U.S.C. 157(c)(1), (c)(2)); *Gravel & Shea v. Vermont Nat'l Bank*, 162 B.R. 961, 966 (D. Vt. 1993). This holds true for a claimant's contention that his claims constitute personal injuries within the meaning of section 157(b)(2)(B). *See Adams*, 86 F.3d 1146. Section 157(b)(5) does not change the result, for the provision only directs the procedure once it is determined that an action is a personal injury tort. *In re Manning*, 71 B.R. 981 (Bankr. N.D. Ala. 1987); *see also Coker v. Pan Am. Corp.*, 950 F.2d 839, 841-45 (2d Cir. 1991) (notwithstanding section 157(b)(5), which directs that claim "shall be tried in the district court," district court has power of permissive abstention to allow the claims to be tried in state court).

I find persuasive the First Circuit's unpublished decision in *Adams* finding a waiver of the issue whether the injury alleged constituted a personal injury tort where the claimant did not raise the matter before the bankruptcy court. Here, in all the time the claimants insisted their claims be tried in the district court, they *never* argued that I lacked core jurisdiction over their claims because they were "personal injury torts," nor did the claimants argue that 28 U.S.C. § 157(b)(2)(B) or (b)(5) precluded my presiding over this trial. (There is also no indication that the claimants made any of these assertions before the district court.) Accordingly, I turn to the merits.

B. *Release and Waiver Under the ADEA*

The first substantive issue arises under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, as amended by Title II of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), 29 U.S.C. § 626(b), concerning the effect of the release, drafted by Leslie Fay and signed by Kishbaugh, by which Kishbaugh purports to waive all claims, including those based on age discrimination, asso-

ciated with his termination and employment at Leslie Fay. Kishbaugh contends that he did not release his ADEA claims because the release fails to meet specific and detailed requirements of OWBPA. Leslie Fay admits that the release did not comport with the requirements for a knowing and voluntary release mandated by the OWBPA, but argues that it nonetheless must be enforced because Kishbaugh did not "tender back" the severance benefits received under it.

Under the OWBPA, "an individual may not waive any right or claim under [the ADEA] unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1) (1990). "[A] waiver may not be knowing and voluntary unless at a minimum" it meets certain specific requirements laid out by the statute, only one of which is relevant here—if the employee is terminated as part of an employment termination program, the employee must receive in writing "the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program." 29 U.S.C. § 626(f)(1)(H). Leslie Fay does not dispute that Kishbaugh's termination fell under "an employment termination program" within the meaning of the statute and that the company failed to comply with subsection (H).

Leslie Fay argues that notwithstanding the mandatory requirements of the OWBPA, an employee may ratify an invalid release by failing to promptly repudiate it upon learning that it was unlawfully obtained. *See Di Rose v. PK Management Corp.*, 691 F.2d 628, 633 (2d Cir. 1982) (under the common law a "contract or release, the execution of which is induced by duress, is voidable, not void, and the person claiming duress must act promptly to repudiate the contract or release or he will be deemed to have waived his right to do so."), *cert. denied*, 461 U.S. 915 (1983)). The burden of proving ratification of an invalid release rests upon Leslie Fay. Leslie Fay also argues that Kishbaugh must be deemed to have ratified the release because he did not tender back the $10,200 he received as a result of signing it.

Whether the OWBPA was intended to supplant the common law doctrine of ratification is the subject of intense debate. *See Reid v. IBM Corp.*, No 95 Civ. 1755, 1997 WL 357969, *14 (S.D.N.Y. June 26, 1997) (quoting 29 U.S.C. § 626(f)(1)); *compare Blistein v. St. John's College*, 74 F.3d 1459, 1466 (4th Cir. 1996) (holding ADEA release enforceable notwithstanding employer's failure to conform the release to the OWBPA because "upon learning that the agreement is voidable, the employee, like the party who acted under duress, can either avoid performance of the contract or accept its benefits and thereby ratify the contract"); *Fleming v U.S. Postal Serv.*, 27 F.3d 259, 261-62 (7th Cir. 1994); *Wittorf v. Shell Oil Co.*, 37 F.3d 1151, 1154 5th Cir. 1994) (same); *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534, 539-40 (5th Cir. 1993) (same), *cert. denied*, 115 S. Ct. 1403 (1995); *with Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1534 (3d Cir. 1997) ("In light of the law as it now stands, we conclude that the ratification doctrine does not apply to ADEA releases which fail to comply with the OWBPA."); *Raczak v. Ameritech Corp.*, 1994 WL 780899 (E.D. Mich. 1994), *rev'd in part*, 103 F.3d 1257, 1270 (6th Cir. 1997) ("Rather than a bar to suit, a release should be considered as a factor that would reduce the judgment amount received by a plaintiff upon bringing suit"); *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993); *Forbus v. Sears, Roebuck & Co.*, 11 F.3d 1036 (11th Cir. 1992); *Eye v. Fluor Corp.*, 952 F. Supp. 635, 641 (E.D. Mo. 1997); *Soliman v. Digital Equipment Corp.*, 869 F. Supp. 65 (D. Mass. 1994); *Isaacs v. Caterpillar, Inc.*, 765 F. Supp. 1359 (C.D. Ill. 1991).

Assuming ratification is possible, whether the common law requires "tendering back" the proceeds of a voidable release before maintaining an action is also the subject of debate. *See, e.g., Reid v. IBM Corp.*, No 95 Civ. 1755, 1997 WL 357969, *14 (S.D.N.Y. June 26, 1997); *Hodge v. New York Collage of Podiatric Medicine*, 940 F. Supp. 579, 579 (S.D.N.Y. 1996); *cf. Kristoferson v. Otis Spunkmeyer, Inc.*, No. 96 Civ. 2521 (S.D.N.Y. June 4, 1997). Recently the United States Supreme

Court granted *certiori* on a case implicating these issues. *See Oubre v. Energy Operations, Inc.*, 1996 U.S. Dist. LEXIS 748, *aff'd*, 112 F.23d 787 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 1466 (Apr. 21, 1997).

The only precedent in this district is *Hodge v. New York College of Podiatric Medicine*, 940 F. Supp. 579, 584 (S.D.N.Y. 1996) in which Judge Jones held that "[a]n agreement that fails to meet the requirements of the OWBPA is merely voidable and not void, and thus can be ratified by acceptance of the benefits conferred by the agreement." The facts in *Hodge*, however, are very different. After the plaintiff filed an EEOC charge, the employer offered the plaintiff an employment contract in exchange for the plaintiff's withdrawal of the EEOC complaint and waiver of those claims. The waiver, however, did not comport with the mandatory requirements of the OWBPA. When the employment agreement expired, the plaintiff sued on his old claims. The court deemed the originally invalid release ratified by the employee's acceptance of the employment contract and the employee's and the employer's completed performance thereunder. It was clear that in *Hodge* the only consideration the plaintiff provided for the release was the release of his age discrimination claims; no other claims were released. Further there was no way to make the employer whole if the release were held invalid because the employment contract that the employer gave in exchange for the release was fully completed by the time the plaintiff initiated the action. *Hodge*, however, did not hold that a plaintiff desiring to sue on ADEA claims when the purported release failed to comport with the mandatory requirements of the OWBPA must "tender back" the monetary consideration received in exchange.

Kishbaugh executed his release on November 15, 1993. He learned in February or March that Leslie Fay was indeed transferring managers, contrary to what he was told when he executed the release. He re-applied for a position on March 24, 1994, notifying the company that it had come to his attention that Leslie Fay was transferring managers. When the

company did not respond within a reasonable time, Kishbaugh filed an EEOC charge. On August 3, 1994, he filed a proof of claim with this court. Under these circumstances, Leslie Fay has not persuaded me that Kishbaugh did not act promptly in repudiating the release of his ADEA claims. *See Di Rose*, 691 F.2d at 633.

We turn to whether the common law doctrine of "tender back" applies to bar Kishbaugh from now claiming he is not bound by the release. Significantly, Kishbaugh did not release only his ADEA claims. As noted by almost every court considering whether ratification is possible, the OWBPA and the ADEA do not declare a non-conforming release "void." Therefore, a proper inquiry may be to look at the value of the consideration received and whether other claims were also released. *See generally Long*, 105 F.3d at 22 (3d Cir. 1997) (dissent). For example, if the plaintiff released other claims lawfully (i.e. breach of contract, slip and fall claims) it would appear inequitable to require the plaintiff to return the total of the benefits paid before being able to maintain an age discrimination suit for those claims which were unlawfully released. In some instances the adjudication of that value may await trial. *See generally Long*, 105 F.3d at 1543 (majority opinion) ("An employer found liable will be entitled to a set-off of any severance benefits paid").

Whereas it is generally inequitable to allow a plaintiff to retain the proceeds of an invalid release and at the same time maintain a lawsuit on the very claims that the release was intended to obviate, that principle may not have the same vitality under the OWBPA even in the face of the common law doctrines of voidability, ratification, and tender back. The reason is that, under the common law, the release is either going to be found valid or not depending on whether it was procured by fraud or duress, whereas in an OWBPA suit, the whole release is not necessarily invalid. Notably, the statute declares the release of age discrimination claims unknowing and not voluntary only when certain statutory minima are not met. Additionally, the policy behind the ADEA and the

OWBPA suggests that a *per se* rule requiring tender back would be inappropriate. In enacting the ADEA, Congress determined that "older workers find themselves disadvantaged in their efforts to retain employment and especially to regain employment when displaced from their jobs." 29 U.S.C. § 621. *Kristoferson* noted that retired employees in age discrimination lawsuits might never be able to earn the wherewithal to return the consideration, 1997 WL 297027 at *4, a result that would appear clearly at odds with the purpose of the ADEA and OWBPA; *see Long*, 105 F.3d at 1539-1542 (analogizing OWBPA to the Federal Employer's Liability Act ("FELA"), 45 U.S.C. § 51 (1939) under which the Supreme Court held that the tender back doctrine was "wholly incongruous with the [statute's] general policy." *Hogue v. Southern R. Co.*, 390 U.S. 516 (1968)).

Kishbaugh received $10,200 when he was terminated in 1992 at age 53 after having been with Leslie Fay since 1976. Aside from his ADEA claims, Kishbaugh released "any and all charges, claims and actions arising out of his employment" that arose prior to his termination. The release of these claims would not be valid unless the party who gave the release received something of value to which that party was not otherwise entitled. *Chaput v. Unisys Corp.*, 964 F.2d 1299, 1301 (2d Cir.) (applying New York law). Because Kishbaugh gave up something more than his ADEA claims, I do not believe that his failure to tender back the severance paid is fatal to his action, although, were he to recover, a setoff might be appropriate.

C. *Age Discrimination*

The ADEA was enacted in 1967 to combat age discrimination in employment settings. 29 U.S.C. § 621-634 (1988). The ADEA provides that it is "unlawful for an employer . . . to discharge any individual or otherwise discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1) (1988). The New York

Human Rights Law affords protections similar to the ADEA, see N.Y. Exec. Law § 296 (1)(a) (McKinney's 1997), as does the Pennsylvania Human Rights Law embodied in section 955(a) of the Pennsylvania Human Relations law. All of New York's and Pennsylvania's employment discrimination laws and the ADEA follow the analysis and shifting burdens of proof outlined by courts interpreting civil rights violations under title VII. *See Armbruster v. Erie Civic Center Auth.*, 937 F. Supp. 484. 495 (W.D. Pa. 1995) (interpreting 43 Pa. Stat. Ann. § 951 *et seq.*), *aff'd*, 100 F.3d 946 (3d Cir. 1996); *Gallo v Prudential Residential Servs, L.P.*, 22 F.3d 1219, 1225 (2d Cir. 1994) (interpreting ADEA and N.Y. Exec. Law 296(1)(a)).

First, the plaintiff must present a *prima facie* case of discrimination by showing that:

(1) he is a member of a protected class;

(2) he is qualified for the position;

(3) he was discharged;

(4) in circumstances giving rise to an inference of age discrimination.

*See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

To rebut a plaintiff's *prima facie* case, "the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-525 (1993); *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("the defendant need not persuade the court that it was actually motivated by the proffered reasons in order to nullify the presumption and obligate the plaintiff to satisfy the burden of proof"); *Board of Trustees v. Sweeney*, 439 U.S. 24, 25 n.2 (1978) (employer need only "explain . . . what he has done"); *Lieberman v. Gant*, 630 F.2d 60, 65 (2d Cir. 1980) (defendants "do not have the burden of establishing that their basis was sound"); *Viola v. Philips Medical Sys.*

*of N.A.*, 42 F.3d 712, 716, 718 (2d Cir. 1994); *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 111 (2d Cir. 1992).

After the defendant meets its burden of production, the plaintiff at all times retains the burden of proving that it is more likely than not his age was a motivating factor in the challenged employment action. *Burger v. New York Inst. of Tech.*, 94 F.3d 830, 832-33 (2d Cir. 1996) (plaintiff carries burden of persuasion); *Burdine*, 450 U.S. at 253; *Ostrowski v. Atlantic Mutual Ins. Cos.*, 968 F.2d 171, 181-82 (2d Cir. 1992); *see also Cronin v. Aetna Life Ins., Co.*, 46 F.3d 196, 203-04 (2d Cir. 1995) (RIF case); *Montana v. First Fed. Savs. & Loan Ass'n*, 869 F.2d 100, 105 (2d Cir. 1995) (plaintiff need only prove that "her age did make a difference."); *Sutera v. Schering Corp.*, 73 F.3d 13, 16 (2d Cir. 1995) (If the defendant carries its burden of production, the plaintiff must show by the preponderance of the evidence that the defendant's articulated reason is more likely than not a pretext for age discrimination).

1. *Gill*

Gill, who signed a valid and binding release for his termination claims, alleges that Leslie Fay failed to rehire him because of his age. A discriminatory "failure to rehire" case, like a discriminatory termination case, is established under the *McDonnell Douglas* test. However, the "mere continuing failure to rehire, without further action on [the] plaintiff's part by way of reapplication or renewed application" cannot revive a plaintiff's original termination claims. *Abrahamsen v. Sperry Rand Corp.*, 20 Fair Emp. Prac. Dec (CCH) ¶ 30,068, 1979 WL 241, *3 (E.D.N.Y. June 8, 1979), *aff'd*, 614 F.2d 1285 (2d Cir. 1979); *Burnam v. Amoco Container Co.*, 755 F.2d 893, 894 (11th Cir. 1985); *Farnum v. Swiss Bank Corp.*, 39 Fair Emp. Prac. Cas. (BNA) 1865, 1986 WL 1172, *2 (S.D.N.Y. Jan. 23, 1986). A plaintiff may, however, show that the employer has a policy of rehiring younger but not older employees. *See, e.g., Equal Employment Opportunity*

*Comm'n v. Farmer Bros. Co.*, 31 F.3d 891, 899-900 (9th Cir. 1994).

Gill alleges that at the time he was terminated from his production manager position Mazur assured him that if any position became available, he would be considered. Gill contends that he applied for an open position in the Spitalnik division for which he was qualified and was rejected because of his age, with Leslie Fay hiring someone for the position who was five years his junior. Gill arguably has presented facts sufficient to state a *prima facie* case for age discrimination in Leslie Fay's failure to rehire him.[12]

Howard Horder, who had placed the ad for the position, never received Gill's application. Gill argues that Leslie Fay had an obligation to consider him for all future positions in light of Mazur's stated intention to find Gill another job at Leslie Fay. However, Gill testified that in a subsequent conversation Mazur told him that, "I'm sorry but they want you out." This being so, Gill could not reasonably have relied on any statement of future intention which Mazur may earlier have made. And if Gill was relying on Mazur, why didn't Gill call Mazur about the position advertised in the newspaper? Based on this evidence, I do not think that it was reasonable for Gill to presume that, without the need to make applications, he would be considered for all future positions opening at Leslie Fay. Gill seems to have recognized this himself, since he says he actually applied for the Spitalnik position.

As for the second position, which was not advertised but was filled by Ochs (age 52), the fact that Leslie Fay did not recruit Gill for the position does not raise the spectre of age

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[12] Once the employer comes forward on its burden of production, "whether the plaintiff had properly made out a *prima facie* case . . . is no longer relevant." *United States Postal Serv. v. Aikens*, 460 U.S. 711, 715 (1983). Thus, if the defendant has met its burden of production, the court need not determine whether the plaintiff has established a *prima facie* case, but rather must proceed to determine the ultimate question of whether the defendant intentionally discriminated against the plaintiff. *Id.*

discrimination. Ochs specialized in import sourcing, an area admittedly outside of Gill's expertise. Leslie Fay's filling the other positions with people from Liz Claiborne (ages 57, 49, 48, 48, 41, 37 and 31) does not demonstrate that Gill was not recruited for these jobs because of his age. It is quite apparent that Ochs hired these people from Liz Claiborne because he had worked with them previously and their focus was on import sourcing.

Gill's assertion that he should have received Guarilia's job is interesting. Whereas the two are the same age, Gill testified that he should have been offered the position because "qualifications should be considered." I agree, but the failure to consider Gill for Guarilia's job is not attributable to actionable age discrimination. *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S. Ct. 1307, 1310 (1996) ("an inference of age discrimination can not be drawn from the replacement of one worker with another worker insignificantly younger"); *see also Viola*, 42 F.3d at 718 ("Job qualification is a necessary predicate to establishing a *prima facie* case but it is not sufficient to create an inference of discriminatory intent.").

In short, I do not believe that age discrimination played a part in Leslie Fay's failure to rehire Gill.

2. *Falbaum*

Promissory estoppel probably prevents Leslie Fay from contending that it did not have to consider Falbaum for the top distribution position when it opened up eleven months after his termination. Falbaum was never told why Erickson had been brought in above him, and Weinstein assured Falbaum after he was terminated that Weinstein would continue to look for a position for Falbaum. Falbaum testified that he did not send in further applications because he relied on Weinstein's promise to consider him. This caused Falbaum not to apply for Erickson's position when he left. That reliance is reasonable insofar as the opening was (i) of the position which Falbaum had held prior to Erickson's employment and (ii) occurred not too long after Falbaum was laid

off. The fact that Falbaum did not apply for Erickson's position thus does not insulate Leslie Fay from Falbaum's claim for failure to rehire. Leslie Fay had reason to foresee Falbaum's reliance because Weinstein assured Falbaurn be would be considered at the time they were urging he sign their release and accept benefits which Falbaum had indicated he believed inadequate. *See generally Chemical Bank v. City of Jamestown*, 122 A.D.2d 530, 531, 504 N.Y.S.2d 908, 909-10 (App. Div. 4th Dep't 1986) (in enforcing promissory estoppel, the plaintiff must allege and prove (1) clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained in reliance); *see also Kastel v Winnetka Board of Ed.*, 946 F. Supp. 1329, 1340-42 (N.D. 111. 1996) (applying promissory estoppel to failure to rehire claim).

Bob Sink (age 49), an existing Leslie Fay employee who is six years younger than Falbaum, was transferred into the position that became available when Erickson left. Whereas Leslie Fay makes much of the fact that Sink himself is in the protected class, this fact alone does not rebut discriminatory intent: "The fact that one person in the protected class has lost out to another person in the protected class is . . . irrelevant, so long as he has lost out because of his age." *O'Connor*, 116 S. Ct. at 1310. Although Leslie Fay's witnesses neglected to explain why they did not consider Falbaum for Erickson's position, the undated critical memorandum from Mazur is strongly suggestive that Falbaum was not considered for his old position for performance reasons unrelated to age discrimination. Notably, Erickson had been brought in above Falbaum more than a year before Falbaum was terminated. Terwilliger's testimony that when Erickson was hired Terwilliger was told that "it was another situation where someone was going to get hurt by New York" does not suggest that Falbaum was either replaced because he was an older employee or not rehired for that same reason. In addition, Sink's transfer is consistent with Leslie Fay's policy of transferring rather than laying off employees with a broad under-

standing of the industry. While Sink was a few years younger than Falbaum, the ADEA " 'mandates that an employer reach employment decisions without regard to age, but it does not place an affirmative duty upon an employer to accord special treatment to members of the protected group.' " *Rosengarten v. J.C. Penney Co.*, 605 F. Supp. 154, 157 (E.D.N.Y. 1985) (quoting *Williams v. General Motors Corp.*, 656 F.2d 120, 129 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)); *Parcinski v Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983). I think it more likely than not that Leslie Fay's failure to rehire Falbaum for the position that Leslie Fay created above Falbaum a year before he was terminated was for reasons unrelated to age discrimination.

Falbaum also contends that he should have received a position at Sassco for which he says he applied. But Leslie Fay hired someone the same age as Falbaum, so Falbaum's age could not have been a motivating factor in Leslie Fay's decision not to hire him. *O'Connor*, 116 S. Ct. at 1310. Moreover. Leslie Fay has demonstrated the Falbaum never applied for the 1993 Sassco position. There can be no viable claim to promissory estoppel insofar as Sassco is concerned because Falbaum knew that Sassco operated separately. In any event, I also found credible Schreiber's testimony that even if Falbaum had applied (which he did not), Sassco was not interested in hiring him for reasons completely unrelated to his age.

Another position that Falbaum, contends he was entitled to was earned by Granahan when Sink left in October 1995, more than three years after Falbaum was terminated. Even assuming (without deciding) that Falbaum was justified in continuing to rely on Weinstein's 1992 assurance without the need to notify Leslie Fay that he was still looking for employment more than three years later (a presumption I doubt), I do not think that Leslie Fay's decision to promote Granahan, who was already performing an existing function, was motivated by age discrimination. It was consistent with the corporate policy. Falbaum's own testimony demonstrates that at the time

Falbaum left, Granahan (whom Falbaum, himself had recruited to Leslie Fay) was a qualified person with considerable potential as a manager.

3. *Terwilliger*

Unlike the other claimants, Terwilliger bases his surviving claim for failure to rehire upon retaliation as well as age discrimination. So we pause to look at the law regarding retaliatory discrimination.

The New York Human Rights Law provides that it shall be unlawful for any employer to discriminate against any person because he or she has opposed any practices forbidden under that law. N.Y. Exec. Law § 296(1)(e). Retaliation claims require the same shifting burden of proof analysis as for age discrimination claims and the ultimate burden of persuasion rests, as always, on the plaintiff. *Padilla v. Metro-North Commuter R. R.*, 92 F. 3d 117, 122 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 2453, 138 L.Ed.2d 211 (1997).

To establish a prima *facie case* of retaliation, a plaintiff must demonstrate that:

(1) the employee was engaged in protected activity;

(2) the employer was aware of that activity;

(3) the employee suffered an adverse employment action; and

(4) there was a causal connection between the protected activity and the adverse employment action.

*Manoharan v. Columbia Univ. College of Physicians & Surgeons*, 842 F.2d 590, 593 (2d Cir. 1988); *Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1177-78 (2d Cir. 1996). For retaliation claims, "an employee need not establish that the conduct she [or he] opposed was in fact a violation of Title VII [or the ADEA], but rather, only that she [or he] had a good faith, reasonable belief that the underlying employment practice was unlawful." *Reed*, 95 F.3d at 1178-80 (quoting *Manoharan*, 842 F.2d at 593).

Terwilliger's accounts of personal objection to age discrimination practices and resultant retaliation for those objections are vague and inconsistent. Almost as an afterthought, Terwilliger argues that age discrimination and Leslie Fay's intent to practice it were the driving forces in its decision not to rehire him in April 1993. However, Terwilliger's own account contains no reference to age discrimination. Rather, the company was angered by his veiled threat that he was "going to do what [he] had to do." Terwilliger, Tr. 104 (Feb. 19, 1997). It is telling that Terwilliger's EEOC complaint alleging age discrimination was not filed until after his conversation with Gordon in which additional severance was denied.

Terwilliger's deduction that he was discharged for having told Thrope that Leslie Fay had a policy of terminating older people and "sprinkling in" younger people is likely inaccurate. It is undisputed that Leslie Fay terminated just about two-thirds of its work force; it is nonsensical that the many younger members of that force were simply terminated to cover up Leslie Fay's intent to rid itself of older workers. Leslie Fay perceived a real economic need to consolidate its facilities, a decision which I am not in a position to second guess *See Parcinski*, 673 F.2d at 37. During the time that Leslie Fay was consolidating its facilities, it actually hired older personnel, some of whom remain with the company today.[13] The claimants have not offered statistical evidence regarding the percentage of employees remaining with the company today broken down by the relevant protected characteristic as compared with prior to the closing of domestic manufacture, such that I may draw the claimants' suggested inference. In short, there is nothing credible in this record to

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[13] The continued employment of Ms. Bini, however, does not in itself rebut discriminatory intent. This is so because Leslie Fay was already aware of the pending discrimination case and EEOC complaints against it when it hired and decided to retain Ms. Bini. *See Burger v. Litton Indus., Inc.*, 91 Civ. 0918, 1996 U.S. Dist. Lexis 5560, at *37 (S.D.N.Y. Apr. 24, 1996) (citations admitted.).

give substance to the claimants' assertion that age-based animus drove Leslie Fay's decision to stop manufacturing in the United States. *See Wilson v. Supreme Color Card, Inc.*, 703; F. Supp. 289, 298-99 (S.D.N.Y) ("no reasonable and fair minded jury could find that [the company] laid off five minority, men, fabricated a lost lease, and moved its plant and lost business, as a pretext to discriminate against [the plaintiff]"), *aff'd*, 880 F.2d 1320 (2d Cir. 1989). The record demonstrates that Leslie Fay undertook extensive analysis regarding this matter to see if domestic operations could be made profitable. Nor does Terwilliger's testimony that Alan Golub told Terwilliger that Weinstein was hired—"to change the direction of the Pennsylvania factories . . . [and that] Weinstein would do whatever he had to do"—demonstrate age discrimination. Even if Golub had made those comments, they are entirely age neutral. Indeed, they comport with what occurred, significant reorganization to lower overhead.

I also do not set anything insidious about the adding of younger names to the August 1992 RIF list. Terwilliger admitted that there were young names on the original list and Weinstein, Silvi, and Vallecorse testified that they only added names to ensure that the layoffs were in compliance with the law. Employers are permitted to undertake protective measures to ensure compliance with the anti-employment discrimination laws. Standing alone, this fact does not lead me to conclude that by so doing, Leslie Fay must have harbored a desire to terminate older workers. *See Earley v. Champion Int'l Corp.*, 907 F. 2d 1077, 1081-82 (11th Cir. 1990); *Pisana v. Merrill Lynch & Co.*, No. 93 Civ. 4541, 1995 WL 438715, *7 (S.D.N.Y. July 24, 1995); *Maidenbaum v. Bally's Park Place, Inc.*, 870 F. Supp. 1254, 1261 (D. N.J. 1994), *aff'd*, 67 F.3d 291 (3d Cir. 1995). Terwilliger argues that names of younger people were added in order to disguise and conceal the true motive of management to eliminate older employees, but he offers nothing in support of this contention. Whereas Terwilliger said that there were lists put together by Polishan and others referred to as "hit lists" and that Lewkowiez was

on one of those lists, this pejorative nomenclature proves nothing; that there were lists of people to be terminated is not at all surprising during an RIF.

Terwilliger has not proven that he even applied for a position with Leslie Fay after his termination. His suggestion that an application was unnecessary because Leslie Fay would always rehire those it previously terminated without the need for further application is incredible. Leslie Fay was engaged in massive layoffs to reduce costs. It defies logic to suggest that a company undergoing massive restructuring generally would obligate itself to rehire the very employees it had just laid off. According to Terwilliger's first version of the story, both Golub and Gordon informed him that the decision to terminate him was final and Terwilliger responded that he could not wait to be as far away from Leslie Fay as possible. It was not until after I found his release valid that he concocted the story of promises of future employment. Terwilliger did not apply for reemployment during his conversation with Gordon, nor did be apply during his conversation with Pomerantz at the elevator bank in 1995. Terwilliger's description of his 1995 conversation with Pomerantz suggests an "I told you so" tone, rather than one seeking a further reemployment. Plainly, the relationship between the two had deteriorated to such a degree that Pomerantz would not have felt comfortable working alongside Terwilliger. Terwilliger had made public his view that Pomerantz ought be removed from management and was personally involved in a fraud on the company; that being so, I also have my doubts about whether Terwilliger would have applied for further employment while Pomerantz remained at the helm.

Whereas Leslie Fay did hire others for lesser or comparable positions for which Terwilliger was probably qualified, Terwilliger does not demonstrate that Leslie Fay's failure to hire him was the result of age discrimination or retaliation for his objection to age discrimination. Instead the testimony showed that (i) others were hired in some instances because of senior management's proclivity to recruit from Liz Clai-

borne and (ii) Terwilliger was not rehired due to management's disquietude about his repeated demands for additional severance and what was perceived as his implicit threat about what would occur if he were not given what he asked for. Remember that Terwillger waived his claims for retaliatory termination and may not resurrect them now by simply suggesting that he applied for new employment. There must be a new and separate act of discrimination or retaliation for his objection to age discrimination to stand. *Burnam v. Amoco Container Co.*, 755 F.2d 893, 894 (11th Cir. 1985); *see Tschida v. Ramsey County*, 927 F. Supp. 337, 340-43 (D. Minn. 1996), *aff'd*, 108 F.3d 1382 (8th Cir. 1997); *Redd v. Fisher Controls*, 814 F. Supp. 547, 550 (W.D. Tex. 1992) (citing *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980)), *aff'd* 35 F.3d 561 (5th Cir. 1994).

Terwilliger's retaliation claim is presented in a wholly conclusory fashion, without facts or theories that would suggest a causal connection between Leslie Fay's failure to rehire him and age discrimination or prohibited retaliatory animus. Whether Leslie Fay's reasons for not hiring him were commendable or not is irrelevant so long as age discrimination was not a factor in Leslie Fay's adverse employment decision. "The defendant's reason need not be one that the court would agree with, but it must not be discriminatory." *Pisana*, 1995 WL 43815, at *2 (citing *Wilson v. Supreme Color Card, Inc.*, 703 F. Supp. 289, 300 (S.D.N.Y.), *aff'd without opinion*, 880 F.2d 1320 (2d Cir. 1989); *see also Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985); *Haskell v. Kaman Corp.*, 743 F.2d 113, 119 (2d Cir. 1984) ("The defendant is not obligated to show justifiable cause" for the adverse employment decision); *Stanojev v. Ebasco Servs., Inc.*, 643 F.2d 914, 921-22 (2d Cir. 1981); *Occtaviani v. Long Island College Hospital*, No. 87 Civ. 1772, 1991 WL 42922 (E.D.N.Y. Mar. 14, 1991) (no civil rights violation when plaintiff was terminated for refusing to assist supervisor in ousting co-worker even though supervisor called plaintiff a racially based slur shortly before he was terminated); *Rosen-*

*garten*, 605 F. Supp. at 157-58 (quoting *Miller v. General Elec. Co.*, 562 F. Supp. 610, 617 (E.D. Pa. 1983)); *see also Dennis v. Veritas Therapeutic Community, Inc.*, No. 83 Civ. 8698, 1985 WL 425 (S.D.N.Y. Mar. 20, 1985).

It just does not make sense that age had anything to do with Terwilliger's plight. He undeniably had a poor relationship with Polishan. He made statements about Pomerantz which soured their relationship. Although he now claims that Leslie Fay had been discriminating for years, he did not blow the whistle despite his position as the Vice President of Human Resources. Even when he himself was terminated he did not raise the spectre of age discrimination until Leslie Fay decided not to give him more severance benefits than they had originally agreed to. Accordingly, I reject his theory that he was not rehired because of age discrimination or prohibited retaliation.

4. *Lewkowiez*

Lewkowiez claims wrongful discharge stemming from a reduction in force and discriminatory failure to rehire. Lewkowiez was terminated at age 56 although he was performing according to his employer's legitimate expectations. *See Vanderstappen v. Brock Equip. Co* , No. 87 Civ. 20200, 1988 WL 131539, *2 (N.D. Ill. 1988). Despite the elimination of Lewkowiez's position, other, younger people continued to perform a quality control function which actually continues at Leslie Fay today, albeit with respect to imports. Lewkowiez contends that the people who had reported to him began reporting to a much younger production person who was in his thirties. About a year and a half after Lewkowiez was terminated, Leslie Fay also hired a younger employee and named him Director of Quality Control, the same or approximately the same job title which Lewkowiez had held while he was there. The younger employee was given a position for which Lewkowiez was more than qualified. These facts are sufficient to state a *prima facie* case of age discrimination. *See Fisher v. Vassar College*, 114 F.3d 1322, 1333 (2d Cir. 1997).

Leslie Fay explained that Lewkowiez's position was eliminated and never recreated despite the retention of the title. Lewkowiez's focus had been as an overseer of many different functions which ensured the quality of dresses from their inception, rather than simply ensuring that the finished products were deemed worthy of shipment to customers. Cawley testified that Lewkowiez's roles were absorbed by many different people; those who directly reported to Lewkowiez would now report to the production head of each division. Leslie Fay also demonstrated that Farrell, the person to whom Leslie Fay gave Lewkowiez's old title, focused on the *examining* aspects of quality control, a position very different from the one which Lewkowiez held. With this, Leslie Fay has met its burden of production.

"[T]he similarity of the jobs held by an older and younger employees is the touchstone for determining whether a lay-off of the older may be found to be an ADEA violation by a trier of fact." *Burger*, 94 F.3d at 833 (citing *Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106, 111-12 (2d Cir. 1992)). Relevant comparisons include considering the status of non-protected employees with similar, although not identical, job functions and titles. *Id.* Weinstein testified in great detail as to why Lewkowiez's position was eliminated—Lewkowiez's oversight functions were redundant with those of others already involved in the manufacturing process. Leslie Fay proved that it has not hired another person for the position that Lewkowicz filled. Because Leslie Fay was winding down its domestic manufacturing, there was no longer a need for Lewkowiez's expertise in overseeing the quality control of the domestic manufacture of dresses. Lewkowiez has not rebutted this testimony nor has he demonstrated that his age was a motivating factor in Leslie Fay's decision to eliminate his position. There is little suggestion of age discrimination to be drawn in a reduction in force case where the employee's duties are eliminated and the employee cannot demonstrate the employer's continuing need for his skills. *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1421-22 (9th Cir.

1990). Although Lewkowiez testified that had he been offered a lower level position with Leslie Fay he might have taken it, he doesn't say whether or not he expressed that desire to Leslie Fay. (Moreover, the statement is suspect in light of Lewkowiez's declining a higher-paying position with Liz Claiborne.)

Although Weinstein wrote Lewkowiez a letter suggesting that he would be considered for future employment. Lewkowiez does not demonstrate that he relied on that assertion. *See generally Chemical Bank*, 122 A.D.2d at 531, 504 N.Y.S.2d at 909. Instead, Lewkowiez promptly asked for a recommendation letter and found a comparable position in Florida. The simple fact that Weinstein assured Lewkowiez that they would continue to look for a position for him does not prove that Leslie Fay's failure to rehire Lewkowiez for the position filled by Farrell in April 1994 (and later Marino) was the result of age discrimination. The record reflects that the two positions were very different and that Lewkowiez was already gainfully employed in Florida, having also just turned down a position at Liz Claiborne which offered him considerably more money than what he was earning in Florida, not to mention more than what he had earned at Leslie Fay. Moreover, Farrell was hired as part of Ochs' recruiting efforts and Leslie Fay's belief that Farrell could assist in expanding Leslie Fay's customer base, both legitimate nondiscriminatory reasons to hire Farrell and not Lewkowiez. Virtually all of the people who testified attested that it was general business practice to recruit away from other more successful companies. Whereas Terwilliger testified that "it had everything to do with age" he does not explain why this was so. Ochs himself was 52 when hired, and five of the seven people he recruited were in the protected age group.

Lewkowiez also asserts age discrimination lurked behind Leslie Fay's failure to hire him for the Indonesian position which he had asked for within six months of his termination. Cawley testified that he did not remember Lewkowiez asking for that position, but if he did, Cawley says, he would have

directed Lewkowiez to the head of *foreign* manufacturing because Cawley had no authority to hire for overseas. Lewkowiez, on the other hand, specifically recalls Cawley telling him that he was needed in domestic manufacturing as the reason why Lewkowiez could not have the job. Although Cawley admitted to a failed memory in this regard, at best, Lewkowiez has demonstrated that Leslie Fay's proffered reason for not hiring him for the Indonesian position is untrue. However, while "[i]n some cases, an employer's proffered reason is a mask for unlawful discrimination, . . . discrimination does not lurk behind every inaccurate statement." *Fisher*, 114 F.3d at 1337. Given the ease at which the plaintiff may meet his burden of showing a *prima facie* case, "the evidence required to establish a *prima facie* case under *McDonnell Douglas* is not invariably sufficient to sustain an ultimate finding of illegal discrimination." *Id.* Thus, if the plaintiff convinces the trier of fact that it is more likely than not that the employer did not act for its proffered reasons, then the employer's decision remains unexplained and the plaintiff "may rely on the evidence constituting the *prima facie* case, together with supportable inferences to be drawn from the false or erroneous character of the employer's proffered reason for the adverse action." *Fisher*, 114 F.3d at 1333; *Cosgrove v. Sears, Roebuck & Co.*, 9 F.3d 1033, 1038-39 (2d Cir. 1993).

Here, the record is clear that young Cawley got the job in Indonesia because of his relationship to a long-standing Leslie Fay employee. Although the hiring of a less qualified employee because of nepotism may be a questionable business practice, it is not actionable under the ADEA. *Fisher*, 114 F.3d at 1337; *Dennis*, 1985 ATL 425.

5. *Kishbaugh*

Kishbaugh claims wrongful discharge stemming from a reduction in force. At the time Kishbaugh's factory closed and he was terminated, Kishbaugh was 53 years old and performing according to his employer's legitimate expectations.

Leslie Fay told him that no factory managers would be transferred when their factories closed. Notwithstanding that representation, Leslie Fay did transfer a younger factory manager around the time that Kishbaugh was terminated.

The primary focus is whether Leslie Fay treated Kishbaugh less favorably because of his age. The scrutiny is not limited as Leslie Fay suggests to whether Kishbaugh was *replaced* by a younger employee or whether the younger employee had been brought in *after* Kishbaugh was terminated. *See Montana v First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 104-105 (2d Cir. 1989). An inference of age discrimination can be established by evidence showing that younger employees were retained in positions similar to Kishbaugh's. *See Maresco v. Evans Chemetics, Div. of W.R. Grace & Co.*, 964 F.2d 106 (2d Cir. 1992); *Gallo v. Prudential Residential Servs., L.P.*, 22 F.3d 1219, 1224 (2d Cir. 1994); *Vanderstappen v. Brock Equipment Co.*, No. 87 Civ. 20200, 1988 WL 131539, *2 (N.D. 111. Nov. 22, 1988).

"An employer's failure to transfer or rehire older employees, while according such treatment to younger ones, is enough to establish plaintiff's *prima facie* case." *Palmer v. Readers Digest Ass'n. Inc.*, 84 Civ. 8397, 1992 WL 73468, *16 (S.D.N.Y. Apr. 1, 1992); *see also Poklitar v. CBS. Inc.*, 652 F. Supp. 1023, 1027-28 (S.D.N.Y. 1987).[14] Kishbaugh has met this burden, as the chart below illustrates:

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[14] A reduction in force alone does not shift the burden back to the plaintiff or remove the defendant's actions from the reach of the ADEA; the defendant may, however, simply point to the age-neutral procedure that it has implemented in order to meet its burden of production—the only burden it carries. *Viola*, 42 F.3d at 716, *Gallo*, 22 F.3d at 1224-25, *see also Vanderstappen*, 1988 WL 131539 at * 1-2; *Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 81 (2d Cir. 1983); *Williams v. General Motors Corp.*, 656 F.2d 120. 128 (5th Cir. 1981); *Coburn v. Pan Am. World Airways, Inc.*, 711 F.2d 339 (D.C. Cir.), *cert. denied*, 104 S. Ct. 488, 78 L. Ed.2d 683 (1983).

| Factory Manager | Factory | Date Factory moved to Route 315 | Date Manager Terminated | Order Termin-ated | Age of Manager in Nov. 1993 | Length of Service at Leslie Fay |
|---|---|---|---|---|---|---|
| Plaintiff Kishbaugh | Downing | 11/93 | Nov. 1993 | 1 | 53 | 16 years |
| Tommy Gill | Andy | 12/93 | Dec. 1993 | 2 | 50+ | — |
| Pitcavage | Kingston | 12/94 | Dec. 1994 | 3 | 50 | 8 years . |
| Bachkosky | Ricky | 11/92 | Aug. 1995 | 4 | 41 | 18 years |
| McGavin | Pittston | 2/94 | Aug. 1995 | 4 | 40 | 12 years |
| Marino | Throop | 6/94 | still employed | — | 34 | 7 years |

In order to rebut the presumption of age discrimination, Leslie Fay has the burden of proffering "a legitimate non-discriminatory business rationale for its actions." *Viola*, 42 F.3d at 716.

> The purpose of the *McDonnell Douglas* framework is to force the defendant to give an explanation for its conduct, in order to prevent employers from simply remaining silent while the plaintiff founders on the difficulty of proving discriminatory intent.

*Fisher*, 114 F.3d at 1335 (citing *Burdine*, 450 U.S. at 254-56 & n.8). The Supreme Court in *Burdine* explained the reason for placing a burden of production on the defendant at this stage.

> Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's *prima facie* case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to establish pretext.

*Burdine*, 450 U.S. at 255-56. Cawley explained that Kishbaugh was terminated as a result of a legitimate reduction in force and that he rather than Bachkosky was terminated because Bachkosky was already in place when Kishbaugh's factory merged into Ricky Fashions, which was the largest factory. With this, Leslie Fay has satisfied its burden of production. *See St. Mary's Honor Center*, 509 U.S. 502, 508-11, 514-17 (1993). The burden of proving age discrimination remains upon Kishbaugh.

In showing discrimination, the plaintiff may show direct evidence, statistical evidence or circumstantial evidence of age discrimination. *Montana*, 869 F.2d at 104. "In cases involving a reduction in force, the inquiry is highly fact specific." *Burger v. New York Inst. of Tech.*, 94 F.3d 830 (2d Cir. 1996). "[C]ircumstantial evidence must lead a reasonable fact finder to conclude either [that] (1) [the] defendant con-

sciously refused to consider retaining or relocating plaintiff because of his age, or (2) [the] defendant regarded age as a negative factor in such consideration." *Franci v. Avco Corp.*, 538 F. Supp. 250, 256 (D. Conn. 1982) (citing *Williams v. General Motors*, 656 F.2d 120, 129-30 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982)). As noted by the Second Circuit, discrimination cases are often dependent upon circumstantial evidence.

> In assessing the inferences that may be drawn from the circumstances surrounding a termination of employment, the court must be alert to the fact that employers are rarely so cooperative as to include a notation in the personnel file that their actions are motivated by factors forbidden by law. . . . Because an employer who discriminates is unlikely to leave a 'smoking gun' attesting to a discriminatory intent, a victim of discrimination is seldom able to prove his claim by direct evidence, and is usually constrained to rely on circumstantial evidence.

*Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1995) (internal citations and quotation omitted).

In a disparate treatment case, statistical evidence showing a disparate impact may be circumstantial evidence of an intent to discriminate. *Massarsky*, 706 F.2d at 118 & n.14. "A finder of fact is permitted to draw an inference of age discrimination from evidence that, in implementing a reduction in force, the employer has located new positions for younger, but not older, employees." *Cronin*, 46 F.3d at 204.

Kishbaugh has demonstrated that for the six manufacturing facilities moved into Route 315, the only factory manager retained is the youngest one and the next two youngest were among the last to go. Kishbaugh was told that no factory managers would be transferred but thereafter the two youngest ones were transferred. The statistical evidence thus shows some disparity. A sufficient disparity may constitute a "pattern or practice" of discrimination and may support a finding of intentional discrimination. *See Rossini v. Ogilvy & Mather,*

*Inc.*, 798 F.2d 590, 598-99 (2d Cir. 1986) (citing *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (proof of pattern or practice of discrimination supports inference that "any particular employment decision during the period in which the discriminatory policy was in force, was made in pursuit of that plan)); *Ellis v. Provident Life & Accident Ins. Co.*, No. 91 Civ. 7074, 1995 WL 453333, * 5 (S.D.N.Y. Aug. 1, 1995) (citing *Haskell v. Kaman Co.*, 743 F.2d 113, 119 (2d Cir. 1984); *Stanojev v. Ebasco Servs., Inc.*, 643 F.2d 914, 921 (2d Cir. 1981)), *aff'd*, 107 F.3d 2, 1997 WL 76861 (2d Cir. Feb. 24, 1997); *see also Scelsa v. City Univ. of N.Y.*, 806 F. Supp. 1126, 1143 (S.D.N.Y. 1992) ("While in a disparate treatment case, proof of discriminatory intent is required, in some cases it can be inferred from the 'mere fact of a difference in treatment.' "); *Segar v. Smith*, 738 F.2d 1249, 1271-72 (D.C. Cir. 1984), *cert. denied sub. nom. Meese v Segar*, 471 U.S. 1115 (1985); *Silver v. City Univ. of N.Y.*, 767 F. Supp. 494, 498 (S.D.N.Y.), *aff'd*, 947 F.2d 1021 (2d Cir. 1991).

To succeed on a pattern or practice theory, the plaintiff must demonstrate more than "isolated" or "sporadic discriminatory acts." *Ste Marie v. Eastern R. Ass'n*, 650 F.2d 395, 405 (2d Cir. 1981). They must show that the discrimination was "the regular rather than the unusual practice of the defendant." *Id.* at 405-06. In rebutting the inferences arising from the disparity, the defendant may show that the plaintiff's statistics are misleading or may present legitimate nondiscriminatory reasons for the apparent disparity. *Kilgo v. Bowman Transportation, Inc.*, 789 F.2d 859, 874 (11th Cir. 1986).

Leslie Fay has rebutted the statistics by offering credible explanations as to why it terminated Kishbaugh and kept Bachkosky and as to why it retained Marino. Bachkosky's Ricky Fashions' plant moved up to Route 315 in 1992, *before* Leslie Fay decided in August 1993 to close all of the manufacturing facilities. Thus it certainly would make sense that when Downing merged with Ricky, Kishbaugh was the manager to be terminated. Bachkosky was already running the

facility and had also been with the company longer than Kishbaugh. Leslie Fay has also offered a convincing rationale for its retention of young Mr. Marino despite the closing of his factory and notwithstanding the fact that Leslie Fay had earlier told Kishbaugh that no factory managers would be transferred. Marino was transferred in the spring of 1994, coinciding with the strike at Throop and the need for people at Laflin. He had acquired a new expertise during the strike which greatly increased his usefulness to Leslie Fay.

Leslie Fay has failed, however, to explain why it kept McGavin and terminated the older Tommy Gill. This does leave room for a permissible inference that Leslie Fay's explanation as to why it terminated Kishbaugh and not Bachkosky may not be the true one. This is so because Gill's and McGavin's factories were the same size and in Gill's case (unlike with Kishbaugh) his factory actually moved up to Route 315 before McGavin's.

> A defendant which is less than honest in proffering its reasons for discharge risks an unnecessary age discrimination verdict. . . . [T]he *McDonnell Douglas* test is based on the Supreme Court's assumption that 'when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, [a fact finder may (but not necessarily must) conclude] it is more likely than not the employer . . . based his decision on an impermissible condition such as age.

*See Chipollini v. Spencer Gifts. Inc.*, 814 F.2d 893, 899 (3d Cir. 1987), *cert. denied*, 483 U.S. 1052 (1987) (citing *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); *see also Miles v. M.N.C. Corp.*, 750 F.2d 867, 871-83 (11th Cir. 1985); *St. Mary's Honor Center*, 509 U.S. 502; *Fisher*, 114 F.3d at 1338.

The answer, however, lies in Nina Kishbaugh's testimony. As she explained, after Andy was moved up to Route 315, Bachkosky was spread too thin to manage all the combined

functions. Thus it would make sense that when the next factory closed, Leslie Fay would need to transfer that manager in order to assume some of the responsibilities that Bachkosky could not handle.

Kishbaugh, in his post-trial brief, argues that Leslie Fay easily could have "staggered" the closing of the plants in order to manipulate the order of termination so as to discriminate against the older factory managers. He points out that Leslie Fay knew full well it was closing all the plants in August 1993, three months before it closed Kishbaugh's factory, which was followed in short order by the closing of Andy and Pittston. Of the three factories closed within three months of each other, the only manager retained was the youngest one, McGavin (age 40). The two managers who were terminated were both over 50. McGavin had had nine to ten years' less experience than Kishbaugh and had been with the company for less time.

Leslie Fay, unaware of Kishbaugh's unasserted theory that they staggered the plant closings[15], chose not to explain why it closed the factories in the order that it did even in the face of Cawley's testimony that the factories were all performing "in the red" and that no one factory was performing better than another. Leslie Fay relies on the argument that "it is impossible to believe" that Leslie Fay would close down an entire factory at a particular time and terminate its entire staff simply to eliminate the older factory manager and retain the younger, particularly when the company is struggling to achieve profitability (arid planning, in any event, to consolidate all the domestic factories).[16] Repl. Brief at 11-12. At

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[15] The argument was raised for the first time in the Claimants' post trial brief.

[16] I should note that Leslie Fay does not have a burden of *production* on this issue because Kishbaugh has not pleaded a disparate impact claim. One of the *prima facie* elements of a disparate impact claim is to identify the challenged procedure which the plaintiff contends is causing the disparate impact. *District Council 37 v. New York City Dept. of Parks & Recreation*, 113 F.3d 347 (2d Cir. 1997); *Lowe v. Com-*

least one case suggests considering the sufficiency of the statistical evidence in light of any testimony in the record regarding the plaintiff's individual experience of discriminatory treatment. *Rossini*, 597 F. Supp. at 1159. As previously mentioned, I found credible Leslie Fay's explanation for terminating Kishbaugh and retaining Bachkosky and do not believe Kishbaugh was disfavored because of his age. Leslie

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*mack Union Free School District*, 886 F.2d 1364, 1370 (2d Cir. 1989) (focus is the not on the individual plaintiff as much as on the adverse effect of the challenged practice on protected group of which the plaintiff is a member, citing *Wards Cove Packing Co. Inc. v. Atonio*, 490 U.S. 642, 656-660 (1989); *Watson v. Fort Worth Bank & Trust Co.*, 487 U.S. 977 (1988)), *cert. denied*, 494 U.S. 1026 (1990)); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 120 (3d Cir. 1983). The requirement of naming the challenged procedure serves to put the defendant on notice as to the challenged business practice. Nowhere in any of the pretrial pleadings or proceedings, or for that matter during the trial, did the Claimants contend that Leslie Fay "staggered" the factory closings in order to have a younger bottom line. Had Kishbaugh put the defendant on notice that it was his contention Leslie Fay's practice of closing the factories in the order in which it did had a discriminatory impact on his protected class, a verdict in Kishbaugh's favor might have been rendered it that Leslie Fay failed to offer a legitimate business justification for closing the factories in the order that it did. *See Fisher*, *supra*, (if the defendant fails to come forward and proffer a non-discriminatory explanation "in such a circumstance the jury must rule for the plaintiff unless the employer submits evidence that places in doubt the facts underlying plaintiff's *prima facie* case (such as plaintiff's qualification for the job), or furnishes a satisfactory explanation for its inability to tell the reason why the plaintiff was disfavored."); *see also Segar*, 738 F.2d at 1271 (under disparate impact theory, "the employer will be required to show the job relatedness of only the practice or practices identified as the cause of the disparity"). Here, however, Kishbaugh unveiled this new theory of the case in his post trial brief, effectively eliminating Leslie Fay's ability to meet a burden of production on a disparate [ILLEGIBLE] case. Therefore Kishbaugh cannot rely on a disparate impact theory of recovery. *Rossini*, 798, [ILLEGIBLE], at 605; *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 24-25 (2d Cir. 1988) (The critical question "is whether the defendant was reasonably aware of the claim, not whether the plaintiff at some point in the [ILLEGIBLE] period happened to use the right phrase."), *cert. denied*, 490 US. 1105 (1989); *Armbruster v.* [ILLEGIBLE] *Corp.*, No. Civ. 91-5948, 1996 WL 55659 (E.D. Pa. Feb. 7, 1996).

Fay has also persuaded me that Marino was retained because of the strike at Laflin. I find it hard to accept Kishbaugh's assertion that Leslie Fay probably staggered the plant closings in order to have enabled it to retain McGavin and Marino. There were many ramifications of closing factories, most notably the termination of many supervisory personnel in addition to each plant's manager. It seems more likely that Leslie Fay decided to merge all the factories with a single manager supervising the surviving factory and that Leslie Fay did not abandon this strategy until it saw that Bachkosky could not handle everything placed on his shoulders. In light of Leslie Fay's discovery that its original plan would not work it probably changed gears, transferring a second manager, McGavin, to Route 315. I also do not think it more probable than not that Leslie Fay foresaw the spring 1994 union strike as early as August 1993, as Kishbaugh's theory would require me to believe, to find that Leslie Fay did not close that factory until the strike so that Marino could then be transferred to Laflin to acquire needed expertise.

While there is no hard and fast rule on how many discriminatory firings are required to make a pattern or practice intentional discrimination case, Leslie Fay has persuaded me that of the three suspicious terminations, two were justified by business considerations, leaving only one unexplained. That one unexplained termination is insufficient for me to conclude that Leslie Fay engaged in a pattern or practice of age discrimination such that Kishbaugh prevails. *See Marie v. Eastern R.R. Ass'n*, 650 F.2d 395, 406 (2d Cir. 1981); *see also Rossini*, 597 F. Supp. at 1159 ("Though the employer is not required to meet a burden of persuasion of rebutting the disparate treatment claim, the nondiscriminatory explanation must cast sufficient doubt on the plaintiff's proof to permit the trier of fact legitimately to decline to draw an inference of discrimination from that proof."). Although this is a close case in light of Leslie Fay's failure to explain its decision-making process for McGavin, Kishbaugh retains the burden of demonstrating discriminatory intent by a preponderance of the

evidence. I am not persuaded that more likely than not Leslie Fay's decision to terminate him was motivated by age discrimination. Although the numbers are admittedly curious, there does not appear to be a concerted effort to get rid of older workers.

Kishbaugh also asserts a claim for discriminatory failure to rehire. At the time Kishbaugh was terminated, he was not assured that the company would continue to look for a position for him. Kishbaugh submitted a resume a few months later asking for the factory manager position of Pittston/Andy Fashions. That position was not available, however, Leslie Fay having already filled it with the Pittston Manager a month before Leslie Fay received Kishbaugh's application. Kishbaugh has not raised facts sufficient to prove his assertion that Leslie Fay retained McGavin and did not rehire Kishbaugh because of age discrimination.

D. *Sex and Disability Discrimination*

1. *Michaud's Claim of Sex Discrimination*

To establish a *prima facie* case of sex discrimination under Title VII, the plaintiff is required to show that she was treated less favorably than comparably based male employees in circumstances from which a gender-based motive could be inferred. *Montana v. First Fed. Sav. & Loan Ass'n*, 869 F.2d 100, 106 (2d Cir. 1989); *Burger v. Litton Computer Servs.*, 91 Civ. 0918, 1996 WL 421449, 1996 U.S. Dist. Lexis 5560, *27-28 (S.D.N.Y. Apr. 24, 1996) (citing *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994)).

Michaud has stated a *prima facie* case for discriminatory failure to promote. She is in the protected class, sought the position for which she was qualified and was rejected. Leslie Fay placed a man in the position notwithstanding Michaud's greater service to the company. *See Burger*, 1996 WL at * 11, 1996 U.S. Dist. LEXIS 5560 at *7-8.

Leslie Fay explains that Guarilia was more qualified for the factory manager position, having been a factory manager for

many years. Granahan testified that Michaud was having trouble accepting the new audit procedures and was very combative in business situations. With this, Leslie Fay has met its burden of proffering a legitimate business justification for promoting Guarilia and not Michaud.

Therefore, the burden remains with Michaud to demonstrate by a preponderance of the evidence that Leslie Fay's decision not to promote her was motivated by her gender. Ms. Kishbaugh's testimony that the head of engineering said that "as long as present management is in place, there will never be another woman manager," is not direct evidence of discriminatory bias. There was no evidence that the speaker had any input in the decision to promote Guarilia. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (Inferences of intentional discrimination may not be based on "statements by nondecision makers, or statements of decision makers unrelated to the decisional process itself . . . "). Even assuming that the *Price Waterhouse* burden of persuasion shifted to the defendants, I am convinced that Michaud was not promoted because of her inability to take orders and to compromise with other managers, a perceived requirement of the position for which she was passed over. I do not believe it more likely that this particular female—Michaud—did not get the job because she was female.

2. *Michaud's Claim of Disability Discrimination*

The ADA prohibits an employer from discriminating against an employee "because of the disability of such individual in regard to application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. § 12112(a). As defined in the ADA, "Discrimination' includes:

> not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or

> employee, unless . . . [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the [employer's] business . . . .

42 U.S.C. § 12112(b)(5)(A). To establish a *prima facie* case of disability discrimination, a plaintiff must show that (i) she is an individual with a disability; (ii) she is qualified to perform the essential functions of the job; and (iii) the employer had notice of the plaintiff's disability and failed to provide reasonable accommodation. *Lyons v Legal Aid Society*, 68 F.3d 1512, 1515 (2d Cir. 1995). Michaud contends that Leslie Fay failed to reasonably accommodate her disability, subjected her to a hostile work environment and eventually constructively discharged her because of the harassment unleashed on her by her supervisor, Joseph Guarilia. I'll take each assertion in turn.

Michaud's testimony that she has diabetes which requires insulin shots on a daily basis, frequent trips to the ladies' room, and the need for constant maintenance of her sugar level, establishes that she has a disability within the meaning of the ADA. *See Canon v. Clark*, 883 F. Supp. 718, 721 (S.D. Fla. 1995); 42 U.S.C. § 12102(2). Leslie Fay does not dispute her disability nor does it dispute that Michaud was qualified for her position. Her testimony as to her qualifications meets this burden without objection. *See Wernick v. Federal Reserve Bank*, 91 F.3d 379, 384-85 (2d Cir. 1996); *Borkowski v. Valley Center School District*, 63 F.3d 131, 137 2d Cir. 1995); *Teahan v. Metro-North Commuter R.R. Co.*, 951 F.2d 511, 514-15 (2d Cir. 1991), *cert. denied*, 506 U.S. 815 (1992).

The term "reasonable accommodation" means making existing facilities accessible and running a work place which allows a person with a disability to perform the essential functions of the job or allows a person with a disability to enjoy the same benefits and privileges as an employee without a disability. Leslie Fay has demonstrated that it provided Michaud with reasonable accommodation by providing her with an air conditioned office with a desk and chair, allowing her to eat lunch on time, and making available a porter to

carry garments. Guarilia himself told Michaud to ask others to carry the garments. Leslie Fay instructed her to sit and let the examiners bring their questions to her. Michaud contends, however, that once Joseph Guarilia became her immediate supervisor, he threatened to take away her service porter, interrupted her lunch hour, refused her access to her office, and laughed when he witnessed her struggling with garments. Given that there is no dispute that Leslie Fay provided the reasonable accommodation and these issues that Michaud raises all go to whether Michaud's immediate supervisor created a hostile work environment, harassed her, or succeeded in constructively discharging her, Michaud's allegations are all more appropriately taken up in the next section pertaining to Leslie Fay's liability for Guardia's alleged harassment. So it is to the law on harassment that we now turn.

That from "time to time" both Guarilia and Granhan would interrupt her lunch hour to talk about work does not lead me to conclude that Leslie Fay did not accommodate Michaud's disability. With the pace of the examining function as it was, it is not difficult to believe that sometimes management had to speak with Michaud while she was eating. Moreover, she never had a complaint about Lewkowiez's lunchtime work discussions. Michaud's disability did not require she eat on time in silence, only that she be permitted to eat when required, and she was never prevented from that.

Hostile environment and constructive discharge claims are unlike the majority of discrimination claims in that no single act is the sole subject of the allegation. *Smith v. Kmart Corp.*, No. CS 95-248, 1996 WL 780490, * 7 (E.D. Wash. Dec. 18, 1996). Rather, it is the continuation of the hostile working environment and the resulting constructive discharge that constitute violations of the ADA. *See id.*

> A hostile work environment exists when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment.

*Karivian v. Columbia Univ.*, 14 F.3d 773, 779 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1996); *Meritor Sav. Bank. v. Vinson*, 477 U.S. 57, 65 (1986); *see Hendler v. Intelecom USA, Inc.*, 963 F. Supp. 200 (E. D. N.Y. 1997) (recognizing hostile work environment discrimination in ADA context); *Haysman v. Food Lion, Inc.*, 893 F. Supp. 1092 (S.D. Ga. 1995) (same).

The elements of a hostile work environment discrimination claim are:

(1) plaintiff belongs to a protected class;

(2) plaintiff was subject to unwelcome disability harassment;

(3) the harassment was based on plaintiff's protected status; and

(4) the harassment affected a term, condition, or privilege of employment.

*See generally Cosgrove v. Sears Roebuck & Co.*, 9 F.3d 1033, 1042 (2d Cir. 1993).

The United States Supreme Court has recognized a claim for hostile work environment even in the absence of an economic affect on the complainant's employment. *Meritor Sav. Bank.*, 477 U.S. 57. The Fifth Circuit in *Jones v. Flagship Int'l* recognized that a plaintiff's psychological well being is a term, condition or privilege of employment within the meaning of Title VII. 793 F.2d 714, 720 (5th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987); *see also Dortz v. City of N.Y.*, 904 F. Supp. 127 (S.D. N.Y. 1995).

"A plaintiff seeking to establish harassment under a hostile work environment theory [however] must demonstrate some specific basis to hold the employer liable." *Karivian v. Columbia Univ.*, 14 F.3d 773. 779 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994). "[E]mployers are not always liable for the hostile work environment created by their employees, . . . [but] the lack of notice and the existence of complaint procedures do not automatically insulate an employer from liability." *Id.* at 779.

It is clearly relevant if the alleged harasser is the plaintiff's supervisor rather than her co-worker, although such a distinction will not always be dispositive. *Id.* 779-80. The level of the supervisor in the hierarchy within the company and whether there is a reasonable avenue open for complaint will be considered. *Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59, 63 (2d Cir. 1992). The Second Circuit has held that an employer is liable for the discriminatory abusive work environment created by a sufficiently high level supervisor if he is aided in accomplishing the harassment by the existence of the authority entrusted to him by the employer. *See Karivian*, 14 F.3d at 780.

That Guarilia made Michaud's work environment unpleasant is well supported in the record. Nonetheless it is not actionable unless the harassment, intimidation, ridicule, and insult was based on her sex or disability and was sufficiently severe and pervasive that it altered the conditions of Michaud's employment. Moreover, the employer is not liable unless the plaintiff demonstrates some basis upon which to hold the employer liable for the actions of its employees. *See Karivian*, 14 F.3d at 779; *Kotcher*, 957 F.2d at 63.

Verbal assault on account of a person's disability constitutes actionable hostile work environment harassment under the ADA when the harassment is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *See Haysman*, 893 F. Supp. 1092; *see also Burger*, 1996 WL 421447, 1996 U.S. Dist. LEXIS 5560, *29 n.9. Remarks concerning the plaintiff's disability may be evidence that discrimination was an impetus to her supervisor's actions although they do not compel that conclusion. *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *see, e.g., Tomka v. Seiler Corp.*, 66 F. 3d 1295, 1305 n.5 (2d Cir. 1995); *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577 (2d Cir. 1989).

Not only must the plaintiff subjectively feel that the work environment is hostile due to a protected characteristic, the environment must in fact be objectively hostile. *Crawford v.*

*Medina General Hospital*, 96 F.3d 830, 835 (6th Cir. 1996); *Harris v. Forklift Sys., inc.*, 510 U.S. 17, 21 (1993). The fact finder must consider the totality of the circumstances and may consider factors, such as:

> The frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

*Harris*, 510 U.S. at 23; *Cosgrove*, 9 F.3d at 1042; *Kotcher*, 957 F.2d at 62; *Carrerro*, 890 F.2d at 577.

Michaud's own testimony demonstrates that many of the disagreements she had with her supervisors related to her performance regarding the implementation of the new audit system and her perceived insubordination—not to her sex or disability. *See* Michaud, Tr. 842, 853-54 (June 23, 1997). The new audit system required that the examiners inspect fewer garments, so it is conceivable that substandard dresses were indeed "being pushed through without examination." That Michaud was quality conscious is commendable, but if her supervisors instructed her to let the garments go, she was under an obligation to do so, especially after her complaint to Cawley in this regard led to reprimand. If Leslie Fay's new system would result in poorer quality and more returns, that was Leslie Fay's problem and not Michaud's. Michaud predicted that Guarilia would then blame her for the returns, which if true, would certainly be unfortunate and unfair. However, without more, it would not be actionable under the discrimination statutes. *See Shabat v. Blue Cross Blue Shield*, 925 F. Supp. 977, 981-82 (W.D.N.Y. 1996), *aff'd*, 108 F.3d 1370 (2d Cir. 1997); *Monica v. New York City Off-Track Betting*, 93 Civ. 6371, 1995 WL 117879 at *6, 1995 U.S. Dist. LEXIS 3350 at *15 (S.D.N.Y. Mar. 20, 1995) (allegations of unfair criticism and objections to management decisions, combined with conclusory allegations of harassment, do not show constructive discharge); *Stetson v. Nynex Serv. Co.*, 995 F.2d 355, 360-61 (2d Cir. 1993); *Pena v. Brattleboro Retreat*,

702 F.2d 322, 325 (2d Cir. 1983) (employee was not constructively discharged where she was required to train another employee to take over as her supervisor, without any loss in pay or title). And given Michaud's strong backbone, I doubt whether she would have let Guarilia's predicted reaction go unanswered to his supervisor. Michaud recounted a series of disagreements with Guarilia about matters unrelated to sex or her disability, most notably Guarilia's shipment of inferior merchandise and his undermining her in front of the examiners by taking the stickers off dresses and complaining that she was putting too many on. Michaud was also upset that Guarilia would pit the examiners against her. That Guarilia once slammed his hand on the desk and rhetorically inquired, "Do I have to beat you for you to understand that it is what I say and not what you say[?]" while unbecoming, is not actionable hostile work environment discrimination because it was an isolated comment and because I found persuasive the testimony regarding Michaud's refusal to embrace the new audit procedures. This appears to have been an isolated comment from a frustrated supervisor, rather than sexual or disability harassment. Moreover, Michaud baited Guarilia in front of the examiners, dishing out to him much of what she received from him. Without a doubt, she and Guarilia were engaged in a mutual contest of wills. But he was not alone in his negative behavior.

Notwithstanding that the majority of Guarilia's problems with Michaud appear to be business related insofar as Guarilia perceived Michaud as insubordinate, it was unrebutted that Guarilia also used Michaud's disability to demean her. Michaud has demonstrated that Guarilia would laugh at her when she complained about factors she believed detrimental to her health (for example, her having a full lunch hour). She has also testified that although Guarilia told her to use the porter to carry garments, he would laugh when he saw her struggling and trying to carry them herself. He also wondered aloud why, if she was "so damn sick", she didn't just leave. She says he also threatened to take her service porter away

and told her she could not use her office except for lunch and breaks.

Whereas at least some of what Michaud testified to as being harassment probably does not qualify because some of the items suggest more of a personality clash and a battle of wills, the critical question is not so much whether Michaud found the latter category of actions (in the paragraph immediately above) subjectively hostile[17] and whether a reasonable person in the same circumstance would agree, but rather whether Leslie Fay may be held liable for Guarilia's actions. In this vein, it is plain from the testimony of Michaud, as well as of Granahan, that Michaud was not a timid woman. For example, even though her new parking space (which was 14 spots in from the door) was closer to the door than her old one, she testified that the fact that it was two spaces in from where the gravel started (while Guarilia's was just three in from the door) was important to [her]" so she complained to both Guarilia and his supervisor, Granahan. She also felt very strongly about what she perceived as the lower quality assurance resulting from the new audit procedures. Her complaints were not confined to her supervisor, for she also went above his head, and over the head of *his* supervisor, to the Vice President of Leslie Fay's domestic manufacturing, to let it be known that Leslie Fay was cheating its paying customers. Her suggestion that Granahan and Guarilia's three hour lecture regarding chain of command somehow dissuaded her from complaining to Cawley about harassment is not credible. Shortly after that conversation, she again spoke with Cawley about Guarilia's and Granahan's failure to give her a raise.

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[17] While not meaning to belittle Guarilia's cruel comments about her disability or his threats to take away her service porter, it appears that Michaud's complaints about the "time to time" interruptions during lunch were probably not sufficiently pervasive to qualify as harassment. Lewkowiez, her prior supervisor with whom she undoubtedly had a better relationship, testified that she never complained when he "often" interrupted her lunch hour for work discussions. He also saw her carrying garments on more than one occasion, without complaint. She appears to have become significantly more sensitive with the promotion of Guarilia.

She also asked Cawley for a transfer. Other things she deemed important enough to complain about include: Leslie Fay's proposing to sell items not worthy of sale notwithstanding the CFO's orders to do so; Guarilia's undermining her in front of the examiners; being interrupted during lunch; and the lack of air for the examiners in the examining area. She also requested to be laid off or transferred three times in four months. However, Michaud never complained about Guarilia's alleged forcing her out of her own office, failing to accommodate her disability, or harassing her.

Michaud obscurely testified that she complained to Granahan "to tell him this whole thing, about how Joe slammed the desk, and he upset me so badly many times." Michaud, Tr. 851 (June 23, 1997). Granahan testified that Michaud never complained that Guarilia was harassing her or not accommodating her disability. The testimony is not inconsistent. It is not clear from Michaud's testimony that she complained to Granahan about anything other than the fact that Guarilia slammed the desk and asked, "Do I have to beat you to understand that it is what I say and not what you say[?]" This complaint alone does not prove that Michaud informed Granahan about harassment or being denied reasonable accommodation for her disability. I would be hard pressed to presume that Michaud complained to Granahan about disability harassment; it is Michaud who carries the burden of proof.

Michaud also testified that she complained to Cawley that she could not stand to work for Guarilia anymore because it was ruining her health. Cawley denies that Michaud ever complained that Guarilia was abusing her. Again, the testimony is not inconsistent. In light of Guarilia's obvious displeasure with Michaud's work performance (the way she would teach her staff, the numbers they were getting out, her speaking to the factories about their request for more stickers, etc.) and his taking her stickers off dresses and shipping them without repairing them, when she strongly believed that they ought be repaired, Michaud probably felt he was ruining her health. Michaud, who had been at Leslie Fay for a long time,

was accustomed to running the examining department and to having the final say as to what went out and what did not, was suddenly being told that her opinion no longer counted if Guarilia disagreed with it. That her blood and sugar level increased as a result of working for Guarilia is not actionable unless his action related to her disability, and moreover, Leslie Fay can not be held liable unless Michaud demonstrates a basis upon which to find Leslie Fay at fault.

Michaud has proven herself sufficiently tough that I believe that if she was really denied access to her office, was forced to stand, or was subject to pervasive disability harassment, it would have been sufficiently "important to her' that she would have complained to Granahan at the least, but even more likely to Cawley. When Michaud complained to Cawley about the "bad quality imports," without even first approaching Granahan with her concerns, Granahan told her quite clearly that she should go to him first if Guarilia were unresponsive to her complaints. Not only did Michaud not go to Granahan about Guarilia's alleged threats harassment but she did not go to Cawley either. And, of course, she did not complain to the Human Resource Department. Under these circumstances, I conclude that Michaud failed to pursue available reasonable avenues to complain about the alleged harassment. Thus she cannot succeed in holding Leslie Fay liable for the mistreatment of its low level supervisor, Guarilia, particularly since there is no convincing evidence that Guarilia used whatever small authority he had to effect changes in Michaud's working environment. She still used her office and porter and she still had regular lunch times and breaks. His unreported demeaning of her physical condition is insufficient to foist liability on Leslie Fay, for his snide comments could just as easily have been made by a co-worker as a supervisor; in other words, he did not use his position to abuse her. *See Kotcher v. Rosa & Sullivan Appliance Center, Inc.*, 957 F.2d 59 (2d Cir. 1992) (holding that employer not liable for hostile work environment caused by plaintiff's low-

level supervisor absent notice or the failure to provide a reasonable avenue for complaint).

Because Michaud has not shown that Leslie Fay is responsible for Guarilia's actions, she has simultaneously failed to prove that she was constructively discharged due to her disability. *See Stetson v. Nynex Serv. Co.*, 995 F.2d 355 (2d Cir. 1993); *Pena v. Brattleboro Retreat*, 702 F.2d 322 (2d Cir. 1983); *Stewart v. Weis Markets. Inc.*, 890 F. Supp. 382 (M.D. Pa. 1995); *Chisholm v. Foothill Capital Corp.*, 940 F. Supp. 1273, 1282 n.3 (N.D. Ill. 1996).

*Conclusion*

For all of the reasons discussed above, none of the plaintiffs is entitled to a recovery. SETTLE ORDER.

Date: New York, New York
August 18, 1997

/s/ TINA L. BROZMAN
CHIEF UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Case No. 93 B 41724 (TLB)
(Jointly Administered)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*

*Debtors.*

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ERRATA ORDER

APPEARANCES:

FOR THE CLAIMANTS

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By: Arthur M. Wisehart & Heather R. Boshak, Esqs.
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FOR THE DEBTORS

McDermott, Will & Emery, Esqs.
By: Joel E. Cohen & Barbara Funt, Esqs.
1211 Avenue of the Americas
New York, New York 10036

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## DECISION AFTER TRIAL ON EMPLOYEES' DISCRIMINATION CLAIMS

TINA L. BROZMAN, Chief United States Bankruptcy Judge:

IT IS ORDERED that the decision, dated August 18, 1997, be changed as follows:

| | |
|---|---|
| Page 1, line 19: | Substitute "Barbara" for "Barbra" |
| Page 6, lines 16: | Substitute "testimony and exhibits from the estimation hearing" for "testimony taken and exhibits admitted during the estimation hearing" |
| Page 16, lines 8-9: | Substitute "with their affiliations becoming" for "and that such affiliations often became" |
| Page 18, lines 6-7: | Substitute "age 35, for instead of being terminated he" for "(age 35) who, instead of being terminated," |
| Page 18, line 19: | Substitute "were eventually" for "was eventually" |
| Page 21, line 7: | Substitute "Lewkowiez's" for "Lewkowiez" |
| Page 34, line 19: | Substitute "testimony" for "testimoney" |
| Page 40, line 6: | Delete the word "to" |
| Page 79, lines 16-17: | Substitute "The numbers are admittedly curious, but" for "Although the numbers are admittedly curious" |

IT IS SO ORDERED.

Date: New York, New York
September 3, 1997

/s/ TINA L. BROZMAN
CHIEF UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Chapter 11
Case No. 93 B 41724 (TLB)
(Jointly Administered)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

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# DECISION ON THE APPLICATION OF WISEHART & KOCH, ESQS. FOR PAYMENT FOR SUBSTANTIAL CONTRIBUTION PURSUANT TO § 503(B) OF THE BANKRUPTCY CODE

APPEARANCES:

WISEHART & KOCH, ESQS.
19 West 44th Street
New York, New York
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Heather R. Boshak, Esq.

WEIL, GOTSHAL & MANGES, ESQS.
*Attorneys for the Debtors*
767 Fifth Avenue
New York, New York 10167
By: Brian Rosen, Esq.

OFFICE OF THE UNITED STATES TRUSTEE
80 Broad Street
New York, New York 10004
By: Diana G. Adams, Esq.

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TINA L. BROZMAN, Chief United States Bankruptcy Judge:

As part of the final fee application process, two creditors sought compensation for their counsel pursuant to § 503(b) of the Bankruptcy Code based on the substantial contributions to these chapter 11 cases they claim to have made. Having recently denied the application of The Whippoorwill Associates, Incorporated, I now examine the merits of the second application, that of Jacob V. Falbaum, Anthony Gill, Lee L. Kishbaugh, Emile Lewkowiez, Elizabeth Michaud and Raymond J. Terwilliger (the "Movants"). The Movants seek payment of $164,432.50 in attorneys's fees and $16,230.55 in expenses Wisehart & Koch for their substantial efforts in objecting to the confirmation of the Debtors' plan.

The Debtors and the Budget Committee have objected. The Debtors argue that the instant application is but another example of the Movants' efforts to extract monies from the Debtors to cover their legal expenses in pursuing their claims. The Budget Committee asserts that, even when viewing the Movants' services in the best light, the conclusion is inescapable that they did not act in anyone's interest but their own. The Movants have responded to these objections claiming that even if a party's opposition to a plan is ultimately unsuccessful, this failure does not preclude an award for substantial contribution. Further, the Movants suggest that I disallow the Budget Committee's objection because of the conflict of interest presented by Joan Ruby's participation on it.

I need not recite the long history of the motion practice and disputes between the Debtors and the Movants which have

consumed a large share of this and other courts' attention since the inception of these cases.

In general terms, the Movants appear to consider themselves the loyal opposition to the Debtors' reorganization efforts, who performed the necessary task of testing the plan components to ensure that they passed muster under § 1129. They claim that their opposition had the prophylactic effect of causing the Debtors and even this court to use their resources to their fullest.

Arthur M. Wisehart, Esq., the Movants' counsel, testified as to the three acts which his clients believe benefitted the estate. First, the Movants suggest that forcing the Debtors to conduct the claims estimation proceedings on their $80 million worth of claims, which had to be completed in order for the plan to meet the feasibility requirement, benefitted the estate. Second, the Movants trumpet the fact that the objections they interposed to the release provision in section 37.6 of the plan led to its "significant" amendment whereby its scope was narrowed to exclude prepetition breaches of fiduciary duty by current management. Finally, the Movants contend that their objections to confirmation led to the amendment of the plan to provide for the establishment of a committee to pursue derivative action claims the estate might possess. Thanks to these efforts, the Movants believe they ought to be compensated in full at the Debtors' expense.

It is important to note that to be found to have made a substantial contribution the applicant must demonstrate that its extraordinary efforts lead directly to tangible benefits to the creditors, the debtor or the estate. As to the first of the Movants' beneficial acts, there is some rewriting of history going on here. The Movants not only did not *seek* estimation, they *opposed* it. So if there was any benefit, it was conferred by the Debtors. It is absurd to suggest that because the Movants filed $80 million worth of grossly inflated claims, their participation in an estimation of those claims, made necessary by the amount at which they were filed, so aided in the

confirmation process that the Movants should have their fees paid.

As for the Movants' efforts in connection with the release provision, they had originally objected to the release provision *in toto*. *In re The Leslie Fay Cos., Inc.*, 207 B.R. 764, 782 Bankr. S.D.N.Y. 1997). I overruled their objection as to whether tile inclusion of such a release provision was appropriate, finding that management ought to be rewarded for its participation in bringing the reorganization case to a consensual resolution. *Id.* As to the breadth of the releases, I did agree with the Movants that the provision, as proposed, could have resulted in the possibility that the estate could jeopardize a potential recovery under an insurance policy. However, as discussed in the next paragraph, whether any recovery will be achieved by the estate is still subject to speculation. This lack of an actual benefit to the estate falls short of the case law requirement that the estate receive a tangible benefit from the services provided by the creditor.

The Movants take undeserved credit regarding the third asserted basis for relief, establishment of the Derivative Committee; it was at my suggestion that the committee was created. I grant that the Movants did bring to light the issue of the plan's treatment of potential causes of action under the Debtors' directors and officers liability policy. However, the Movants requested that I appoint a trustee or deny confirmation even in light of my suggestion that the plan proponents create the committee which was incorporated into the plan to save potential claims under that insurance policy. *Leslie Fay*, 207 B.R. at 784-85. Indeed, the Movants have appealed from my order of confirmation and refusal to appoint a trustee. The creation of the Derivative Action Committee preserved potential claims for the new owners (the creditors) of the Debtors. It did not necessarily augment the coffers of the Debtors; indeed, the Derivative Action Board may or may not determine to press claims. In any event, as of this date, there has been no tangible benefit bestowed on the estate from the creation of that committee. This is a far cry

from cases awarding fees to counsel based on their efforts that enhanced a debtor's estate. *See, e.g., In re DP Partners L.P.*, 106 F.3d 667 (5th Cir. 1997) (claimant and its attorney uncovered and pursued fraudulent transfers that increased the size of the total estate by $3 million), *In re McLean Indus., Inc.*, 88 B.R. 36, 38 (Bankr. S.D.N.Y. 1988) (applicant alone objected to the debtor's proposed sale of stock and garnered support for its objection from other creditors which ultimately led to the estate accepting an offer which was $1.15 million higher).

The Movants vigorously objected to many facets of the plan at the confirmation hearing, and in material respects their objections were denied. Such activities are exactly the type that case law precludes from compensation as a substantial contribution. *In re Best Products Co., Inc.*, 173 B.R. 862, 866 (Bankr. S.D.N.Y. 1994) (services must confer a significant and demonstrable benefit upon the reorganization process and not be rendered solely on behalf of creditor's own interest) (citing *Tarricone*, 83 B.R. at 255). Moreover, in confirming the Debtors' plan I found that the testimony of Terwilliger, the Movants' sole witness in support of their objections to confirmation, was so incredible and contradictory that I had to give it little credence. *Leslie Fay*, 207 B.R. at 776-79.

Overall, throughout the confirmation process, the activities of the Movants diminished the estate because the Debtors had to conduct a five day hearing to confirm their plan of reorganization which led to delay in payments under a plan that the overwhelming majority of creditors supported. I am not suggesting that the Movants had no right to pursue their objections, but I am saying that it is disingenuous for the Movants to seek reimbursement of their attorney fees given the fact that the Movants have been vigorous albeit unsuccessful litigants with the Debtors. As of today, estate assets continue to be eroded because of the Debtors' need to defend against the Movants' pending appeals.

Case law is clear that the acts that will support an award for a substantial contribution must be intended to foster and

enhance the estate, not to retard and interrupt the reorganization process. This was not a situation where the Movants successfully unmasked that a plan was confimrable, a situation which could be a substantial contribution under appropriate circumstances. Even had the provisions respecting the derivative action been left untouched, the plan was still confirmable. If anything, the Movants encouraged mushrooming administrative expenses throughout the confirmation period with their pursuit of objections to the plan, most of which I denied during the confirmation hearing, and which they continue to prosecute to this day by pursuing their own interests on appeal. This is certainly not one of those rare instances where the creditor's involvement assisted the process. *Best Prods.*, 173 B.R. at 865. I am not suggesting that a creditor has to act out of altruism in order to recover. Indeed, its motive is largely irrelevant. What is significant is that the creditor do something to provide a substantial benefit to the reorganization case. There is no evidence that any of the acts the Movants took have led to any such benefit, for the Debtors, the estate or creditors.

Courts have found the decided lack of corroborating evidence from any party in support of the Movants' application to be significant in weighing the merits of a § 503(b) application. As a case upon which the Movants rely states clearly:

> Something more than mere conclusory statements regarding one's involvement in an act's resulting substantial contribution must be tendered in order for such involvement to be deemed compensable. Corroborating testimony by a disinterested party attesting the claimant's instrumental acts has proven to be a decisive factor in awarding compensation . . . Absent, or in addition to, such corroborating testimony, a court's own first hand observance of the services provided may be sufficient basis on which to find a substantial contribution.

*In re U.S. Lines Inc.*, 103 B. R. 427 at 430. Mr. Wisehart was the only witness to testify at the hearing. Obviously, because

he is both the Movant's counsel and the party affected most by the outcome here, his testimony cannot be used as corroborating evidence. Based on the Movants' lack of corroborating testimony and my own experience with them in these cases, just described, I must deny the application.

A final factor weighs against granting the Movants' application. At the hearing, Mr. Wisehart testified as to his firm's payment arrangement with the Movants. He stated that he has yet to invoice his clients for the services recited in the instant application and further that if I were to deny this application, his clients are not obligated to pay him. Mr. Wisehart's admission suggests that the instant application is an attempt to obtain fees from one source, the Debtors, when the other, the Movants, is under no obligation to pay the firm. In this circumstance the Movants are only a nominal party. Section 503(b)(3) explicitly requires that creditors incur actual and necessary costs in order to be reimbursed. *In re Oxford Homes, Inc.*, 204 B.R. 264, 267-68 (Bankr. D. Me. 1997); *In re Brown*, 147 B.R. 55, 58 (Bankr. D. Mass. 1992) (preliminary inquiry is that expenses of client are actual and necessary). I do not believe that what constitutes Mr. Wisehart's gift to his client should be transformed into an obligation of the Debtors.

The Movants also request that I disallow the objection brought by the Budget Committee because Joan Ruby, a member of the committee, holds an alleged conflict of interest based on her previous employment with the Debtors, a conflict which the Movants claim prevents the Committee from fairly evaluating the merits of their application. Even if that were true, that conflict would not invalidate the separate objection filed by the Debtors. Moreover, this court has an independent duty to review and pass upon any request for fees presented in a bankruptcy case. *See, e.g.*, 2 James F. Queenan, Jr. et al., *Chapter 11 Theory & Practice* § 12.01 at 12:3 (1997); *In re Gillett Holdings, Inc.*, 137 B.R. 475, 480 (Bankr. D. Colo. 1992) (court has affirmative duty to examine and, if appropriate, challenge requested fees, even in the absence of

objection) (citing cases): *In re Concept Clubs, Inc.*, 125 B.R. 634, 636 (Bankr. D. Utah 1991) (court's supervision of professional fees is essential to the operation of the bankruptcy law, integral to the bankruptcy system and required by the Bankruptcy Code).

Upon my own evaluation of the fee application and my knowledge of the litigation positions adopted, I find that the Movants have made no substantial contribution to these estates during the plan confirmation process. I am therefore denying this application in its entirety. SETTLE ORDER.

Dated: New York, New York
August 22, 1997

/s/ TINA L. BROZMAN
CHIEF UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Chapter 11
Case No. 93 B 41724 *et seq.* (TLB)
(Jointly Administered)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

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ORDER EXPUNGING PORTIONS OF CLAIMS OF ANTHONY GILL, JACOB V. FALBAUM AND RAYMOND J. TERWILLIGER (CLAIM NOS. 00077, 00078 AND 00079)

Upon the objections, each dated February 14, 1995 (the "Objections"), of The Leslie Fay Companies, Inc. ("Leslie Fay") for an order pursuant to 11 U.S.C. § 101, *et seq.* (the "Bankruptcy Code") disallowing the claims of Raymond J. Terwilliger, Jacob V. Falbaum and Anthony Gill (collectively the "Claimants") arising out of the termination of Claimants employment with Leslie Fay ("Termination Claims") as well as various post-termination claims ("Post-Termination Claims"); and due and proper notice of the Objections and the relief requested therein having been given; and Leslie Fay and the Claimants having undertaken significant discovery; and a trial having been held an October 11, 1995, continued on November 27, 1995 and concluded on January 16, 1996, to consider the validity of releases with respect to the Termination Claims (the "Trial"); and upon consideration of the

Objections and all of the pleadings filed in respect thereof; and upon the record of the Trial and all other proceedings had before the Court; and for the reasons set forth in the ruling of the Court rendered on January 24, 1996 (the "Opinion") with respect to the Objections; and after due deliberation and sufficient cause existing therefor, it is

ORDERED that the Objections be, and they hereby are granted as set forth herein; and it is further

ORDERED that, pursuant to Section 502 of the Bankruptcy Code, Claimants' Termination Claims be, and hereby are disallowed in their entirety; and it is further

ORDERED that nothing contained in this Order shall be deemed to be a determination of the validity of Claimants' Post-Termination Claims.

Dated: New York, New York
Feb. 2, 1996

/s/ TINA L. BROZMAN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Case No. 93 B 41724

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In the Matter
of

THE LESLIE FAY COMPANIES, INC.,

*Debtor.*

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January 24, 1996

United States Custom House
One Bowling Green
New York, New York 10004

Rendering of decision re claim of Terwilliger.

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BEFORE:

HON. TINA L. BROZMAN,
*Bankruptcy Judge.*

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APPEARANCES:

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New York, New York

BY: BRIAN S. ROSEN, ESQ., of Counsel

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and Raymond Terwilliger
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BY: ARTHUR M. WISEHART, ESQ., of Counsel

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Proceedings

THE COURT: The Debtor, The Leslie Fay Companies, Inc. (the "Debtor") has moved to expunge the claims of Raymond Terwilliger, Jack Falbaum and Anthony Gill (collectively, the "Claimants") all of whom are former employees of the Debtor and all of whom who have asserted that they have been victims of discrimination prohibited by the Age Discrimination in Employment Act, 29 U.S.C. Section 621 et. seq. (the "ADEA"), and by the state human rights laws of Now York and Pennsylvania.

While certainly not conceding that there were any ADEA violations, the Debtor has raised a threshold issue in its defense that it contends provides an independent basis for

expunging the claims even assuming that such violations occurred.

Specifically, the Debtor asserts that the Claimants all executed severance agreements pursuant to which they released the Debtor of any termination-related claims against it in exchange for valuable consideration for which they were not otherwise entitled. An a result, the Debtor contends, the question of whether the Claimants suffered unlawful discrimination has been rendered irrelevant and cannot form the basis for sustaining the claims filed.

The Claimants respond that the releases are no bar because they wore not "knowing and voluntary" as require by the Older Workers Benefit Protection Act, 29 U.S.C. Section 626(f) ("OWBPA").

Because the viability of the Claimants' age discrimination claims against the Debtor was dependent upon the validity of the releases, at the urging of the Debtor I bifurcated the proceedings, trying first the issue of whether the releases precluded the claims. This was done with the understanding that the Claimants would be able to proceed with their age discrimination claims if the releases wore found to be invalid. Thus, for the purposes of this hearing, I have assumed that the Debtor did in fact unlawfully discriminate in violation of the ADEA. After we had embarked upon this procedural route, the Claimants clarified their positions, asserting that they had post-release age discrimination claims as well.

In addition to the denying the Claimants' allegations, the Debtor contends that, a matter of law, the Claimants were required to tender back the consideration received in exchange for the releases before they could maintain an action contesting their validity. Because, as I shall explain, I find that the releases at issue were validly obtained in any event, I need not entertain that argument.

*FINDINGS OF FACT*

1. At all times relevant to this proceeding, the Debtor was engaged in, among other things, the manufacture and distri-

bution of dresses. This component of the Debtor's operations was referred to as the "dress group." The dress group maintained its production and distribution facilities at various locations within the State of Pennsylvania.

2. Jacob V. Falbaum was employed by the Debtor from March 1977 until the date of his termination, on or about August 7, 1992. At that time, Falbaum was the director of physical distribution of the Debtor's dress division.

3. On or about August 7, 1992, Falbaum's employment was terminated by the Debtor. His termination was the result of a reduction in force program ("RIF") instituted by the Debtor in order to reduce the expenses of the dress group, which had been experiencing declining sales. (Testimony of Max Weinstein, Transcript of October 11, 1992 at 9 through 12).

4. At the time of Falbaum's termination, the Debtor presented Falbaum with a proposed severance agreement. (Testimony of Jacob V. Falbaum, Transcript of 11/27/95 at 324). In exchange for release of all claims, including those under the ADEA, that Falbaum may have had against the Debtor, the Debtor offered to pay Falbaum approximately $17,000. This figure represented one week of salary for each year that Falbaum had been employed with the Debtor (Exhibit D-4). The proposed agreement included, in capital letters, the following heading: "CONSULT WITH A LAWYER BEFORE SIGNING THIS AGREEMENT AND RELEASE. BY SIGNING THIS AGREEMENT YOU GIVE UP AND WAIVE IMPORTANT LEGAL RIGHTS." Id.

5. Nancy Pearson, an employee of the Debtor who works in the personnel department, testified that as a matter longstanding company policy, employees were not otherwise entitled to any severance pay (Transcript of October 11th at 67).

6. Initially, Falbaum was given forty-five days in which to consider the Debtor's offer.

7. Together with the proposed severance agreement, the Debtor provided Falbaum with a list of ages and job descriptions of all other Debtor employees whose employment had been terminated as part of the RIF. (Exhibit D-4, Falbaum, Transcript 11/27 at 325). Not all of those employees were necessarily located at the same Debtor facility at which Falbaum was employed (Falbaum, Transcript 11/27 at 326 through 28).

8. In a letter dated September 23, 1992, Falbaum informed Max Weinstein, vice-president of the Debtor's dress division, that in his opinion the severance package being offered was "grossly inadequate" in light of his value to the firm during his years of service, and stated that an amount four times that being offered was "more realistic." (Exhibit C-8).

9. In a letter dated October 27, 1992, Weinstein apologized to Falbaum for his delay in responding to letters Falbaum had sent him, but declined to "increase the severance package previously offered" by the Debtor. The letter also noted that the forty-five days Falbaum had to accept the offer had passed, but that Falbaum would nonetheless be given an additional ten days during which to consider the offer. (Exhibit C-38).

10. On November 5, 1992, Falbaum signed the agreement under the terms originally proposed by the Debtor. (Exhibit D-4, Falbaum, Transcript 11/27 at 332). Falbaum testified that he signed the agreement in order to receive the $17,000 being offered by the Debtor, because it was his understanding that he would not receive anything if he did not sign it. (Transcript of 11/27 at 338).

11. Anthony Gill was employed by the Debtor from 1978 until the date of his termination on March 17, 1992. At that time, Gill was a production manager at one of the dress group's Pennsylvania facilities.

12. On March 17, 1992, Gill's employment was terminated by the Debtor.

13. According to Weinstein, Gill was discharged because of a decrease in the dress group's sales, which caused the Debtor to consolidate certain of its operations. As a result, Gill's services were no longer necessary. Weinstein testified that Gill's discharge was not part of any RIF. (Transcript of October 11th at 12 through 15). This account was implicitly corroborated by Raymond Terwilliger, the Debtor's Vice President of Human Resources and a claimant in these proceedings, who testified under cross-examination that Gill was terminated for reasons other than an RIF. (Transcript of 11/27 at 249 through 50).

It was also corroborated by Robert Silvi, a former employee of the Debtor, who testified at his deposition that to his recollection, there were two RIF's in 1992, one in August and one in November of that year. (Exhibit C-31 at 13). Gill was terminated months earlier, in March. Accordingly, I find that Gill was not terminated pursuant to an RIF.

14. At some point contemporaneous with or subsequent to his termination, Gill was presented with a proposed severance agreement. In exchange for a release of all claims that Gill may have had against the Debtor, the Debtor offered to pay Gill approximately $20,000. (Testimony of Gill, Transcript of 11/27 at 171).

15. In a letter dated May 20, 1992, Gill asked Weinstein to increase the amount of his severance package. Gill asked for "1 year severance pay plus the car and medical insurance until age 62, plus option to stay in the program until age 65, if needed, at employee rates" (Exhibit C-2). Gill explained that the health insurance component was of "utmost importance" to him in light of his medical condition, and that for that reason he was "so unyielding about this part of (his) release package." Id.

16. The Debtor and Gill ultimately entered into a severance agreement. In exchange for the releases sought by the Debtor, the Debtor agreed to pay to Gill the sum of $25,000. The Debtor also agreed to provide Gill with the funds to acquire the automobile that the Debtor had previously purchased for

his use. Finally, the Debtor agreed to continue Gill's medical insurance cove rage until June 30, 1993. The agreement was dated June 2, 1992. (Exhibit D-1).

17. The agreement between Gill and the Debtor contained the same prominent caveat about consulting a lawyer that was contained in the Falbaum agreement. It also stated that the Debtor's offer would be held open for twenty-one days, or until June 23, 1992. Id.

18. Gill testified that he was told by Terwilliger that he had only twenty-four hours to either sign the agreement or risk getting nothing. (Transcript 11/27 at 157). However, Gill conceded that at the time he was told this he already had the proposed agreement in his possession for "a lot more than twenty-four hours." (Transcript at 170).

19. While Gill would not concede the point in so many words, it is clear from both his testimony and the documentary evidence that the agreement he ultimately signed was a product of significant negotiation between the parties. Gill testified that the Debtor's initial offer to him was to pay him 20,000. The amount ultimately paid to his pursuant to the agreement was $25,000. Yet under cross-examination, Gill made the assertion that the Debtor unilaterally decided to add an extra $5,000 to its offer, without having been pressed into doing it at all. (Transcript 11/27 at 170 through 172).

In addition, Gill admitted that there were "several releases" discussed between the parties. (Transcript 11/27 at 169) whose terms changed because Gill "wouldn't sign the release." Id. Gill also testified that despite the prominent heading on the agreement, he did not understand the language advising his to "consult a lawyer." Id. at 173.

Further, he testified that he did not understand that he was giving up his right to sue the Debtor. Id. In light of the extensive negotiations that took place, Gill's own testimony that he was capable of performing "any production job within the entire corporation . . . and any inside management job," Id. at 160, and the clarity of the language of the agreement, it is

simply incredible to imagine that Gill did not understand the ramifications of his actions.

20. Raymond J. Terwilliger was employed by the Debtor from February 1978 until the time of his termination on or about August 8, 1992. At that time, Terwilliger was the Debtor's vice-president of human resources.

21. On or about August 8, 1992, Terwilliger's employment was terminated by the Debtor. There is conflicting testimony as to the reason for Terwilliger's termination. Alan Golub, who at the time was the president of the Debtor, testified that Terwilliger was discharged because of what Golub alleges was Terwilliger's poor performance of his duties. (Transcript 10/11 at 91 through 106). However, in light of other evidence in the record, it seems that Golub's account was not entirely candid. Terwilliger testified that his termination was due to ill will that existed between himself and Paul Polishan, who at the time was the Debtor's chief financial officer. (Transcript 11/27 at 199 through 200).

This account was corroborated by Herman Gordon, who at the time of Terwilliger's termination was the Debtor's general counsel. Gordon testified that it was his understanding that "there was a constant battle going on between Mr. Terwilliger and Mr. Polishan." (Transcript 11/27 at 131). The testimony was further corroborated by the statements of Silvi, who indicated in his deposition that the existence of a feud between Terwilliger and Polishan was well-known. (Exhibit C-31 at 7 through 8).

Moreover, it is difficult to believe that the Debtor would have suddenly become dissatisfied with Terwilliger's abilities after he had held the same position without incident for well over a decade. In any case, it is clear that Terwilliger was not terminated as part of an RIF.

22. After Terwilliger was terminated, he began to have discussions with Gordon about entering into a severance agreement with the Debtor, which, in exchange for valuable consideration, would release the Debtor of any claims Ter-

williger may have had against it, including those under the ADEA. (Gordon, Transcript of 10/11 at 107).

23. Ultimately, the Debtor and Terwilliger entered into two interrelated agreements. On August 13, 1992, they entered into what was referred to as a "termination agreement." (Exhibit D-3). That agreement obligated the Debtor to give Terwilliger, among other things, a cash payment of $86,250 and continued medical insurance coverage through May 1993. Id. By its terms, the termination agreement would not take effect unless and until Terwilliger signed a second document, which was called a "release agreement."(Exhibit D-2).

This agreement was very similar to the ones entered into by the other claimants, and provided that Terwilliger would waive any claims he may have had against the Debtor, including any ADEA claims. In that agreement, Terwilliger acknowledged that he had been given at least twenty-one days to consider whether to sign it and that he was given an opportunity to consult with an attorney. Id. And in fact, the release agreement was not signed until September 10th, nearly one month after the execution of the termination agreement. Id.

24. The termination agreement also contained the following provision: "In the event (Terwilliger) does not obtain new employment by May 31, 1993, (Terwilliger) may request the (Debtor) to continue payments and benefits for an additional period of time. Additional payments or additional benefits shall be at the discretion of the (Debtor)." (Exhibit D-3). This provision was added in the course of negotiations between Gordon and Terwilliger and was a response to Terwilliger's concern that he might not be able to find new employment by May 31st. (Gordon, Transcript of 10/11 at 111, Terwilliger, Transcript of 11/27 at 228).

25. Sometime during April or May of 1993, Terwilliger called Gordon to request the continued benefits referred to in the termination agreement. The Debtor denied this request. (Gordon, Transcript 10/11 at 112, Terwilliger, Transcript 11/27 at 234 through 36). It was at that time that Terwilliger

consulted an attorney to pursue his claims against the Debtor (Terwilliger, Transcript 11/27 at 273).

26. Terwilliger testified that he signed the agreements under duress. So says that at a meeting he had with Michael Thrope, the Debtor's outside counsel, Thrope told him that "things would be made very difficult" for him if he "didn't cooperate with them." ("them" referred to Golub, and the Debtor's CEO, John Pomerantz). When he was asked what he understood those words to mean Terwilliger responded: "I understood that to mean that it would be made very difficult for me in terms of future employment, very difficult to me in terms of references, very difficult for me in terms of any number of areas as it related to myself personally and my family. And it was very open-ended and I took it to be very threatening." Id. at 232. Despite attempts by Claimants' counsel to refresh his memory, however, Terwilliger was unable to recall when the meeting that he described took place, or even whether the meeting preceded his signing of the release. (Transcript 11/27 at 230 through 34).

27. Furthermore, in a complaint filed on behalf of the Claimants against certain non-debtors in the district court, only on meeting between Thrope and Terwilliger is mentioned, and it is alleged to have taken place on or about February 24, 1993, some six months after Terwilliger signed the release agreement. (Transcript 11/27 at 250-253). When presented with this fact upon cross-examination, Terwilliger appeared uncomfortable, and suggested that "the threats that took place in my situation took place any number of different occasions after August 10th," Id. at 251, although Terwilliger failed to describe any other than the one meeting with Thrope.

28. Terwilliger explicitly contradicted himself over the course of his testimony. On direct examination he testified, "I don't know if subsequent to the signing of (the) release I ever had a conversation with Mr. Thrope." Id. at 234. On cross-examination, however, when asked what his best recollection was as to the number of conversations that took place, he

stated, "My best recollection was that it clearly occurred once before the execution of the release and once subsequent to the filing of the Chapter 11." Id. at 286 through 87. He repeated this with more specificity later, when he conceded that the February 24th date stated in the district court complaint came from his "best recollection at the time." Id. at 292.

29. Thrope testified that he had only one meeting with Terwilliger with respect to his termination, and that indeed occurred on February 24th, at a restaurant known as the "Dish of Salt." Thrope testified that the meaning took place on his own initiative, to try to got Terwilliger "to stop asking for this additional compensation . . . which he was not entitled to." (Transcript 11/27 at 351).

According to Thrope, he had no previous involvement in the Terwilliger termination owing to the close personal relationship that had developed between Terwilliger and Thrope over the period of Terwilliger's employment with the Debtor. Id. at 350. Thrope stated that he told Terwilliger to put Leslie Fay behind him and go on with his life and that he had "made a deal" with the Debtor, and that it wasn't right to renege upon it. Id. at 351 through 53. Thrope testified that he had "no other conversations relating to (Terwilliger's) termination or his release or employment practices generally at the company since his termination" Id. at 356. I found Thrope's account of what occurred more credible than Terwilliger's.

*DISCUSSION*

The Claimants have all challenged the validity of their releases, on the theory that were not "knowing and voluntary" as required by OWBPA. Under that statute, a waiver may not be considered knowing and voluntary unless, at a minimum, certain enumerated statutory requirements are met. See 28 U.S.C. Section 626(f).

Pursuant to the OWBPA's requirements, an employee must be given consideration in exchange for a release, must be advised in writing to contact an attorney prior to signing such

a release, and must be given seven days following the execution of release during which to revoke it. Id.

Additionally, if an employee is terminated pursuant to an "exit incentive program or other employment termination program offered to a group or class of employees, "the employee must be given a period of at least 45 days to consider the agreement. Id. at 626(f)(1)(F)(ii). Such an employee must also be notified in writing of the "job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program." Id. at Section 626(f)(1)(H)(ii). Employees not terminated pursuant to an employment termination program must be given at least 21 days to consider a release agreement. Id. at 626(f)(1)(F)(i). The OWBPA also contains certain additional requirements that are not alleged by the Claimants to have been violated by the Debtor.

Finally, the OWBPA provides that the burden of proving that a waiver was knowing and voluntary falls to the party asserting the validity of the waiver. Id. at Section 626(f)(3).

The Debtor has clearly met its burden of proving that the releases signed by the Claimants are all valid under the OWBPA. First, the Debtor has satisfactorily demonstrated that the Claimants were not otherwise entitled to any compensation for the termination of their employment. Nancy Pearson's testimony van credible and wholly unrebutted on that point.

Second, all of the agreements facially complied with the OWBPA in every respect. They were short, easy to understand, and contained numerous boldly printed caveats to inform the reader of their significance. One court has suggested that some plaintiffs may essentially concoct scenarios to claim that releases which fully comply with the law are invalid because they are not knowing and voluntary. This is done in the knowledge that such plaintiffs are assured that summary judgment cannot be granted. See Wamsley versus Champlin Refining and Chemicals, Inc., 11 F.3d 534, 538 (5th Circuit 1993), cert. denied, 115 Supreme Court 1403 (1995).

Because the other issues that have been raised are specific to each individual claimant, I will address them separately.

*JACOB FALBAUM*

Falbaum has essentially raised two challenges to his release. First, he claims that he was "coerced" into signing a release, because he was told that unless he did so, he would get "nothing." Taking all of Falbaum's testimony as true, it nonetheless appears that what Falbaum night refer to as a threat was merely the Debtor's recitation of the cold, hard facts. Because Falbaum was not otherwise entitled to any severance pay, he would indeed have received nothing had he not agreed to sign a release. Presumably, the difference between the $17,000 he received and the nothing he was otherwise entitled to was Falbaum's incentive to enter into the agreement.

Second, Falbaum claims that the list of terminated employees he was provided pursuant to Section 626(f)(1)(H) was over-inclusive, because those employees were not part of the same "job classification or organizational unit." According to Falbaum, this is because some of the employees on the list provided him worked outside the Wilkes-Barre, Pennsylvania manufacturing facility where he was located. The Eleventh Circuit Court of Appeals has recently dealt with precisely this issue. It stated:

> To our knowledge, it is an issue of first impression whether "individuals in the same job classification or organizational unit" can include employees outside a single facility.
>
> Statutory construction begins with the words of the statute itself . . . Neither "job classification" nor "organizational unit" is defined, but neither phrase naturally includes only the employees at a specific plant. Given the myriad organizational structures of the business world, it is easy to conceive of a unit that would span more than one plant. . . . Thus, to limit individuals in

> the same "job classification or organizational unit" to a single plant would be to read the statute's words contrary to their naturally broad meaning and to insert an exception where none is written.

Griffin versus Kraft General Foods, Inc., 62 F.3d 368, 372 (11th Circuit 1995). I find the Eleventh Circuit's reasoning to be compelling. Accordingly, there is no basis for the contention that the RIF list provided Falbaum violated the OWBPA.

*ANTHONY GILL*

Anthony Gill has also raised two claims in contest to the release agreement that he signed. First, his papers alleged that his termination came as a part of the RIF, and that he was therefore entitled to the special protection provided members of "employment termination programs" by the OWBPA. However, Gill did not testify that he was terminated as a part of the RIF, and has not presented any evidence to counter Weinstein's unequivocal assertion that Gill was not terminated as part of any RIF.

In addition, Gill claims that his signing of the release was coerced because he was told by Terwilliger that if he did not sign it within twenty-four hours, he would get "nothing." But Gill conceded that by the time Terwilliger gave him this message, Gill had already been in possession of the severance agreement for a "lot more than twenty-four hours." (No one who testified was able to recall precisely when Gill was given the proposed release agreement, but the Claimants have not challenged the May 11th date recited in the release. (See Exhibit D-1).

Thus, even were Gill's statement that he had only twenty-four hours to sign the release accepted at face value, the evidence clearly demonstrates that there was no coercion here, because he has not denied he was given a full twenty-one days to consider the release pursuant to the

OWBPA. He was simply told at some point that he would be given only twenty-four more hours.

*RAYMOND TERWILLIGER*

Despite his penchant for lengthy speeches, Terwilliger's basis for attacking his releases boils down to one—that like the others, he was coerced into signing the releases. (He also asserted a breach of contract theory on the stand that was not present in any of the Claimants' papers, and that is too meritless to warrant a response. (Transcript 11/27 at 273). Similarly, in his closing argument, Claimants' counsel, Mr. Wisehart, made the incredible assertion that Terwilliger's employment was terminated as part of an RIF. Terwilliger's own lengthy testimony about the reasons for his termination, none of which even remotely implicated the RIFs, underscore the absurdity of counsel's contention).

Terwilliger's claim of coercion flies in the face of all the evidence presented at trial, including his own testimony.

First, although he refused to use the word "negotiate" in his testimony, the sum and substance of his testimony was that he indeed negotiated the terms of his termination. When asked whether the "eventual amount of severance pay" provided under the agreements were same as the Debtor's initial offer, Terwilliger conceded that "there were changes." (Transcript 11/27 at 254). When pressed on how those changes came about, he admitted to informing the Debtor that he was unsatisfied." Id. at 253.

Terwilliger would also like me to take note of the fact that he was not represented by counsel in his dealings with the Debtor. That fact is duly noted. However, it does not advance his position in any way. Terwilliger is admittedly a highly educated professional whose area of specialization—human resources—afforded him a great deal of familiarity with his legal rights and remedies with respect to his termination. According to Terwilliger, he did not retain counsel because he trusted Gordon and did not want to "spend the money" on a lawyer. Whether this decision was penny wise and pound

foolish is of no moment to these proceedings. It was Terwilliger's decision to make, and having made a decision, he must new abide by its consequences.

At closing arguments, Mr. Wisehart for the first time questioned the validity of the consideration tendered Terwilliger. The termination agreement provided that the parties agreed that "the amounts owed" by the Debtor to Terwilliger "for services performed as an employee" would be paid to him "on the effectiveness of the General Release agreement(.)" (Exhibit D-3) Claimants' counsel argued that the foregoing provision rendered the money already owed Terwilliger part of the consideration that was paid for the release agreement, in violation of the OWBPA, which requires consideration to which an employee was not already entitled.

I cannot subscribe to Wisehart's tortured reading of the agreement. Numbered paragraph 3 of the termination agreement contains a clearly enumerated list of four items that Terwilliger was to receive as consideration. Nowhere in that paragraph is there any mention of payment of salary due, there is not a scintilla of evidence elsewhere in the record to indicate that either party considered the payment of Terwilliger's salary to be somehow contingent on his signing of the release agreement. The termination agreement's inclusion of Terwilliger's salary could have been for a number of reasons, including perhaps to make it clear that the consideration paid for the agreements would be in addition to anything that Terwilliger was already owed.

Wisehart raised one additional contention at closing argument that until then had not been articulated in his papers. According to Wisehart, Terwilliger was fraudulently induced into entering into the agreements because of the Debtor's representation to him that his termination was not performance-related. Terwilliger, he says, consequently believed that he would have no problem getting references from the Debtor if he needed them, and that he would ultimately be able to obtain other employment.

Unfortunately for Wisehart's client, this imaginative theory is completely unsupported by the record. Nowhere over the course of his lengthy testimony did Terwilliger assert that he was interested in references, or that such an interest activated him to sign the agreements. There wasn't even any proof that Debtor was ever asked to provide a reference at all, or that it would not have done so if asked. Furthermore, the release agreement contained an integration clause, in which Terwilliger acknowledged that he "relied only an the promises written in the termination agreement and this agreement and not on any other promise made by the company." (Exhibit D-2 paragraph 10). Thus, if Terwilliger wanted to hold the Debtor to promises which his counsel says were made, Terwilliger was obligated to have them reduced to writing and included in the agreements.

In addition to vigorously defending the validity of the releases, the Debtor has argued that the admitted failure of the Claimants to tender back the amounts paid under the agreements constitutes the Claimants' ratification of those agreements. The Debtor bases its contention on the Fifth Circuit decision in Wamsley, at 11 F.3d at 538-542, which found that release agreements that are not "knowing and voluntary," as defined by the OWBPA, may nonetheless be ratified by the subsequent failure of employees to return funds paid by the employer pursuant to such agreements. In response, the Claimants have cited Oberg versus Allied Van Lines, 11 F.3d 679, 682-84 (7th Circuit 1993), which stands for the opposite proposition—that release agreements that violate the OWBPA are void and not merely avoidable, and thus can never be ratified subsequently.

I need not take a position on this issue, however. Because, as I have explained, the release agreements here fully complied with the OWBPA, the question of ratification in the event of noncompliance does not arise.

Finally, it is plain that because the Claimants' ADEA claims have not survived their execution of the releases, their remaining non-ADEA claims arising out of their terminations

have not survived either. See Norton versus Houston Industries, Inc., 1994 Westlaw 686614 star 5 (Southern District Texas April 5, 1994) (common law standards "subsumed by the more stringent requirements of the OWBPA.")

Accordingly, the claims arising out of the terminations of the Claimants must be expunged. The post-release claims are preserved for further adjudication.

MS. FUNT: Thank you, Your Honor.

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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95-5060

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JACOB V. FALBAUM, *et al.*

—v.—

THE LESLIE FAY COMPANIES, INC.

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NOTICE OF MOTION FOR DISMISSAL OF APPEAL

MOTION BY:

WEIL, GOTSHAL & MANGES
767 Fifth Avenue
New York, NY 10153
Brian S. Rosen, Esq.
(212) 310-8000

Has consent of opposing counsel:

| | | |
|---|---|---|
| A. been sought? | ☒ Yes | ☐ No |
| B. been obtained? | ☐ Yes | ☒ No |
| Has service been effected? | ☒ Yes | ☐ No |
| Is oral argument desired? | ☒ Yes | ☐ No |

*(Substantive motions only)*

Requested return date:

*(See Second Circuit Rule 27(b))*

Has argument date of appeal been set:

A. by scheduling order? ☒ Yes ☐ No

B. by firm date of argument notice ☐ Yes ☒ No

C. If Yes, enter date: _____

OPPOSING COUNSEL:

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Emergency Motions. Motions for Stays & Injunctions Pending Appeal

Has request for relief been made below? ☐ Yes ☒ No

*(See F.R.A.P. Rule 8)*

Would expedited appeal eliminate need for this motion? ☐ Yes ☒ No

If No, explain why not: _____

_____

_____

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☒ No

Judge or agency whose order is being appeal:

United States District Judge Miriam G. Cedarbaum

Brief statement of the relief requested:

Dismissal of the appeal

By:

/s/ BRIAN ROSEN
Brian S. Rosen

Appearing for:

The Leslie Fay Companies

Appellant or Petitioner:

☐ Plaintiff ☐ Defendant

Appellee or Respondent:

☐ Plaintiff ☐ Defendant

Date:

10/10/95

ORDER

*Before*:

The Hon. Amalya L. Kearse, Hon. Ralph K. Winter,
Hon. José A. Cabranes

IT IS HEREBY ORDERED that the motion be and it hereby is granted based on this Court's lack of jurisdiction. IT IS FURTHER ORDERED that the cross-motion be, and it hereby is, denied.

FOR THE COURT,
GEORGE LANGE III, Clerk
By:

/s/ BETH J. MEADOR
Beth J. Meador,
Administrative Attorney

Date: November 7, 1995

Issued as Mandate November 9, 1995

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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94 Civ. 5502 (MGC)

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JACOB V. FALBAUM, ANTHONY E. GILL, EMILE LEWKOWIEZ, and RAYMOND TERWILLIGER,

*Plaintiffs*,

—against—

JOHN J. POMERANTZ, ALAN GOLUB, LAURA H. POMERANTZ, HERMAN GORDON, and B. MICHAEL THROPE,

*Defendants*.

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94 Civ. 7921 (MGC)

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LEE L. KISHBAUGH,

*Plaintiff*,

—against—

JOHN J. POMERANTZ, ALAN GOLUB, LAURA H. POMERANTZ, HERMAN GORDON, and B. MICHAEL THROPE,

*Defendants*.

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CEDARBAUM, J.

Leslie Fay, a women's clothing manufacturer, is a debtor-in-possession in bankruptcy proceedings in this District. Five former managerial employees sue four current employees of Leslie Fay and Leslie Fay's outside counsel for age discrimination in their "individual capacities" under federal, New York State, Pennsylvania, and New York City law. Jurisdiction is based on a federal question, 28 U.S.C. § 1331, and diversity of citizenship. 28 U.S.C. § 1332.

Defendants move to dismiss the complaints on the ground that only the employer is suable and that they are not subject to personal liability under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, the New York State Human Rights Law, N.Y. Exec. Law §§ 290 *et seq.* (McKinney 1993) ("NYHRL"), and the Pennsylvania Human Relations Act ("PHRA"), Pa. Stat. Ann. tit. 43, §§ 951 *et seq.* (1991 & Supp. 1994). In addition, defendants move to dismiss plaintiffs' claims under the PHRA and the New York City Civil Rights Law ("NYCCRL"), Admin. Code of New York City § 8-101 *et seq.* (1986 Supp. 1994), for failure to exhaust administrative remedies.

The complaints also assert claims of legal malpractice and breach of fiduciary duty against Herman Gordon, Leslie Fay's general counsel, and B. Michael Thrope, Leslie Fay's outside counsel. At oral argument, I granted defendants' motion to dismiss the claims against Gordon and Thrope but reserved decision on the balance of defendants' motion. (Tr. Feb. 2, 1995 at 34.) For the reasons that follow, defendants' motion to dismiss is granted in part and denied in part.

*Background*

Plaintiff Jacob V. Falbaum was Director of Physical Distribution for the Dress Division of Leslie Fay; Anthony E. Gill was Production Manager; Emile Lewkowiez was Director of Quality Control; Raymond J. Terwilliger was Vice President of Human Resources; and Lee L. Kishbaugh was Factory Manager for the Dress Division. Defendants are the Chairman of the Board of Directors and Chief Executive officer of Leslie Fay, a Senior Vice President, the President, and the General Counsel, who is also a Senior Vice President. Leslie Fay is not named as a defendant in either complaint. Defendants are alleged to be "agents of Leslie Fay who in their supervisory positions instigated, authorized, required, caused, and aided and abetted" age discrimination. (Falbaum Amend. Compl. at ¶ 7; Kishbaugh Compl. at ¶ 6.) Specifically,

defendants are alleged to have "conceived, devised and conspired" to implement a discriminatory "reduction-in-force" program, pursuant to which plaintiffs were terminated. (Falbaum Amend. Compl. at ¶ 30; Kishbaugh Compl. at ¶ 28.) In addition, defendants are alleged to have "conspired among themselves and with others to retaliate against those individuals, including plaintiffs, who opposed or protested against defendants' willful and deliberate discriminatory acts and practices, and requested or recommended remedial action with respect thereto." (Falbaum Amend. Compl. at ¶ 31; Kishbaugh Compl. at ¶ 31.)

*Discussion*

I. *Age Discrimination in Employment Act*

The ADEA makes it unlawful for an "employer," *inter alia*, to discharge an individual on the basis of age. 29 U.S.C. § 623(a)(1). An employer is defined as "a person engaged in an industry affecting commerce who has twenty or more employees." 29 U.S.C. § 630(b). The statute further defines an employer to include "any agent of such a person." *Id.* Defendants move to dismiss the ADEA claims on the ground that the statutory reference to "agent" authorizes only employer liability for the conduct of employees acting within the scope of their employment, but does not provide an independent cause of action against such employees personally. This question—whether supervisory personnel may be personally liable under the ADEA for acts undertaken in their capacities as agents—has sharply divided courts in recent years.

The ADEA's definition of employer, including the term "agent," is very similar to that found in other civil rights laws such as Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e(b) and the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12111(5)(A). The issue of the personal liability of agents has also been addressed in cases arising under those statutes, and courts have relied on

those cases to interpret the ADEA. *See, e.g., Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510-511 (4th Cir.), *cert. denied*, 115 S. Ct. 666 (1994). Several Circuits have held that an individual may not be personally liable for conduct performed as an agent under either the ADEA, the ADA or Title VII. *See E.E.O.C. v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (individuals may not be personally liable as agents under ADA); *Birkbeck*, 30 F.3d at 510-511 (individuals may not be personally liable as agents under ADEA); *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir.) (individuals may not be personally liable as agents under Title VII), *cert. denied*, 115 S. Ct. 574 (1994); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993) (same); *but see Ball v. Renner*, 54 F.3d 664, 668-69 (10th Cir. 1995) (declining to reach issue in Title VII case absent proof that defendant exercised managerial/supervisory authority over plaintiff); *see also Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993) (individuals may not be personally liable as agents under either the ADEA or Title VII), *cert. denied*, 114 S. Ct. 1049 (1994); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (individual may not be liable in individual capacity under Title VII); *cf. Lenhardt v. Basic Inst. of Technology, Inc.*, 55 F.3d 377, 381 (8th Cir. 1995) (individuals may not be liable as agents under Missouri Human Rights Act patterned after Title VII).

The Second Circuit has not been presented with the question, and the decisions in this district have divided. *See, e.g., Coraggio v. Time Inc. Magazine Co.*, No. 94 Civ. 5429 (MBM), 1995 WL 242047, at *9 (S.D.N.Y. 1995) (individuals may not be personally liable under Title VII, but may be named in their "official capacities"); *Dirschel v. Speck*, No. 94 Civ. 330262 (LMM), 1994 WL 330262, at *6 (S.D.N.Y. 1994) (individual may be personally liable as agent under Title VII); *Reilly v. Metro-North Commuter R.R. Co.*, No. 93 Civ. 7317 (PKL), 1994 WL 202720, at *1 (S.D.N.Y. 1994) (dismissing Title VII claim against individual where no evidence that plaintiff would be prejudiced by proceeding

against employer); *Donato v. Rockefeller Fin. Servs.*, No. 93 Civ. 4663 (LLS), 1994 WL 695690 (S.D.N.Y. 1994) (denying leave to amend complaint to add individual defendant where plaintiff would "suffer no prejudice" from proceeding against employer alone); *Bramesco v. Drug Computer Consultants*, 834 F. Supp. 120, 123 (S.D.N.Y. 1993) (individual may not be personally liable under Title VII and the ADEA absent specific allegations of age discrimination against individual defendant and prejudice in dropping individual defendant from the case); *Archer v. Globe Motorists Supply Co.*, 833 F. Supp. 211, 214 (S.D.N.Y. 1993) (dismissing Title VII and ADEA claims against individual defendants, but noting that allegations of "individualized personal misconduct" might support personal liability); *Allen v. City of Yonkers*, 803 F. Supp. 679, 693 (S.D.N.Y. 1992) (individuals may not be personally liable as agents under Title VII); *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1180 (S.D.N.Y. 1992) (individuals may be personally liable as agents under Title VII) No. 91 Civ. 8010 (MBM), 1992 WL 370419, at *5 (S.D.N.Y. 1992) (individual may be personally liable as agent under the ADEA); *Cheng v. Tams Consultants, Inc.*, No. 90 Civ. 5832 (CSH), 1991 WL 79198, at *3 (S.D.N.Y. 1991) (supervisory personnel may be personally liable as agents under Title VII); *Lehtinen v. Bill Communications, Inc.*, 59 Fair Empl. Prac. Cas. (BKA) 1077, 1081 (S.D.N.Y. 1989) (individual who "participated in the decision making process" resulting in the alleged discrimination may be personally liable under Title VII); *Bradley v. Consolidated Edison Co.*, 657 F. Supp. 197, 207 (S.D.N.Y. 1987) (employees acting within scope of their authority may not be personally liable under Title VII); *Tuber v. Continental Grain Co.*, 36 Fair Empl. Prac. Cas. CBNA) 933, 937 (S.D.N.Y. 1984) (individuals who "controlled some aspect of [plaintiff's] conditions of employment" are employers under Title VII); *Women in City Gov't United v. City of New York*, 515 F. Supp. 295, 299 (S.D.N.Y. 1981) (trustees who approve retirement plan may not be personally liable under Title VII); *Rodgers v.*

*Grow-Kiewit Corp.*, 93 Lab. Cas. (CCH) ¶13,431, at 20,541 (S.D.N.Y. 1981) (individual may not be personally liable as agent under the ADEA); *Hannahs v. New York State Teachers Retirement System*, 26 Fair Empl. Prac. Cas. (BNA) 527, 532 (S.D.N.Y. 1981) (individuals may not be personally liable under Title VII insofar as they act "pursuant to their official duties"); *Bradley v. Rockland County Community Mental Health Ctr.*, 25 Fair Empl. Prac. Cas. (BNA) 225, 228 (S.D.N.Y. 1980) (individual may be personally liable as agent under Title VII if he "personally participated in the decision making process that forms the basis of the alleged discrimination"); *Friend v. Union Dime Sav. Bank*, 24 Fair Empl. Prac. Cas. (BNA) 1307, 1310 (S.D.N.Y. 1980) (individuals may not be personally liable as agents under ADEA).

Consideration of this issue must begin with the plain language of the statute, which is ordinarily dispositive. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). However, "[w]here the result of a literal interpretation of statutory language is absurd, or where the obvious purpose of the statute is thwarted by such slavish adherence to its terms, [the court] may look beyond the plain language" of the statute. *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 677 (2d Cir. 1985) (citations omitted). This is particularly appropriate where there is an alternative interpretation of the statute consistent with the legislative purpose. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). The plain language of the ADEA makes it unlawful for an "employer" to discriminate on the basis of age. In defining this term, the statute specifically exempts persons or entities who employ fewer than twenty employees. By further defining an "employer" to include liability for the conduct of persons acting as "agent[s]," the ADEA adopts the familiar doctrine of *respondeat superior*, under which a principal is liable for the tortious conduct of its agent. *See Birkbeck*, 30 F.3d at 510 (term "agent" incorporates doctrine of *respondeat superior*). The common law rule is that an employer may be liable for the intentional torts of its

employees if they are committed within the scope of employment. *See Shager v. Upjohn Co.*, 913 F.2d 398, 404-05 (7th Cir. 1990). This rule applies to the intentional tort of discriminatory discharge. *See id.* at 405 ("[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer.") (*citing* Restatement (Second) of Agency § 228 (1957)).

The language of the statute suggests that agents might be liable for their conduct under the ADEA, particularly since under general principles of agency law, liability of a principal under the doctrine of *respondeat superior* does not extinguish the liability of a culpable agent. *See Katara v. D.E. Jones Commodities, Inc.*, 835 F.2d 966, 972 (2d Cir. 1987); Restatement (Second) of Agency, §§ 343, 359C(l), 217B(1) (1957). However, the ADEA does not expressly provide a cause of action against agents—as noted above, the statute only makes it unlawful for an "employer" to discriminate on the basis of age. Although the statute defines an "employer" to include an "agent," treating an agent as subject to suit in an individual capacity appears to conflict with the ADEA's careful definition of "employer" to exempt employers of fewer than twenty persons. Whether this exemption evidences a congressional desire to protect small employers from the burdens associated with litigating discrimination claims, *see, e.g., Miller*, 991 F.2d at 587, or to protect the associational rights of individuals and small entities, *see Jendusa v. Cancer Treatment Ctrs. of Am., Inc.*, 868 F. Supp. 1006, 1013-1015 (N.D. Ill. 1994), imposing independent personal liability on individual employees in their capacity as agents appears to be at odds with the text and structure of the statute. Individuals who are acting as agents are the "smallest of legal entities," *Grant*, 21 F.3d at 649, and "[i]f Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees." *Miller*, 991 F.2d at 587;

*compare Jendusa*, 868 F. Supp. at 1014 (given congressional desire to protect associational rights of small businesses, legislative history of Title VII does not conclusively demonstrate that Congress did not intend individual liability). As one Court of Appeals has recently noted, "it would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does not apply with full force to a person who supervises the same number of workers in a company employing twenty or more." *Birkbeck*, 30 F.3d at 510.

The unique relationship between the Fair Labor Standards Act ("FLSA") and the ADEA does not change this conclusion. Unlike Title VII or the ADA, the ADEA selectively incorporates certain remedies and procedures of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201 *et seq. See* 29 U.S.C. § 626(b). Because courts have held that "the term employer [under the FLSA] includes individuals with managerial responsibilities and 'substantial control over the terms and conditions of the [employee's] work,' " *Lee v. Coahoma County*, 937 F.2d 220, 226 (5th Cir. 1991) (quoting *Falk v. Brennan*, 414 U.S. 190, 195 (1973)), some courts have suggested that Congress intended to incorporate into the ADEA the broad definition of employer in the FLSA. *See, e.g., House v. Cannon Mills Co.*, 713 F. Supp. 159, 160-61 (M.D.N.C. 1988). However, the FLSA contains an explicit and more expansive definition of employer than the ADEA. *See* 29 U.S.C. § 203(d) (" 'Employer' includes any person acting directly or indirectly in the interest of an employer in relation to an employer"); *see also* 29 U.S.C. § 203(g) (" 'Employ' includes to suffer or permit to work"). In addition, the fact that the ADEA selectively incorporates certain remedial and procedural portions of the FLSA suggests that Congress intended to adopt only those portions expressly referenced. *See Miller*, 991 F.2d at 588 n.3. Finally, unlike the ADEA, the FLSA does not exempt small employers from its reach. The FLSA's definition of employer provides

no exception for employers who employ fewer than a certain number of employees.

Plaintiffs contend that the ADEA should provide for individual liability because it advances the remedial goals of the statute. The ADEA is one of a series of federal civil rights statutes broadly designed to eradicate invidious discrimination in the workplace. *See McKennon v. Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995). To effectuate this goal, the remedial aspects of the ADEA are designed both to deter employers from engaging in discrimination and to provide relief to the victims of discrimination. *McKennon*, 115 S. Ct. at 884. Thus, it has been argued that individual liability is necessary to achieve these goals. *See, e.g., Hamilton v. Rodgers*, 791 F.2d 439, 442 (5th Cir. 1986).[1] For instance, one judge has observed,

> [t]he prospect of individual liability is essential if the anti discrimination statutes are to have their full deterrent effect. . . . This court cannot conclude that Congress intended to accomplish Title VII's deterrence function through indirect reliance upon the marketplace assumptions concerning the actions of rational economic actors/employers after incurring a civil penalty based on the discriminatory conduct of one of their employees.

*Jendusa*, 868 F. Supp. at 1011; *see also Cheng*, 1991 WL 79198, at *3 (supervisory employees may be liable under Title VII in part because a "liberal interpretation of the

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[1] *Hamilton* is of questionable vitality. In *Grant v. Lone Star Co.*, 21 F.3d 649, 651-53 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994), the Fifth Circuit held that an individual could not be liable for backpay damages in a sexual harassment case under Title VII. The Court distinguished *Hamilton*, noting that a subsequent decision had "rejected a reading of *Hamilton* . . . that would permit personal liability for damages under title VII." *See Harvey v. Blake*, 913 F.2d 226, 228 n. 2 (5th Cir. 1990) ("to the extent that *Hamilton* is inconsistent with the rule . . . that public officials may be liable for backpay under Title VII in their official capacity only, *Hamilton* is nonauthoritative.")

statute" is "necessary to effectuate its remedial purposes") *(citing Hamilton).*

Plaintiffs also contend that two cases in this district hold that the bankruptcy of an employer or its inability to satisfy a judgment warrants the imposition of personal liability on individual employees acting as agents of the employer. *See Elias v. Sitomer*, No. 91 Civ. 8010 (MBM), 1992 WL 370419, at *5 (S.D.N.Y. 1992) (permitting action under ADEA against individual as agent where corporate employer was bankrupt)[2]; *Archer v. Globe Motorists Supply Co.*, 833 F. Supp. 211, 213-14 (S.D.N.Y. 1993) (dismissing Title VII and ADEA claims against individual defendants, but suggesting that "if the employer in the present case is undercapitalized and for that reason unlikely to be able to pay any judgment, a basis for penetrating the corporate veil may exist"). Neither case stands for the proposition which plaintiffs advance. Nothing in the opinion in *Elias* suggests that the bankrupt status of the employer should be a reason for holding the agent personally liable under the statute. If an employer is engaged in bankruptcy proceedings, an aggrieved employee may seek relief in the bankruptcy court, as plaintiffs in this case have done. Furthermore, piercing the corporate veil—an equitable doctrine designed to remedy abuse of the corporate form—is completely separate from the question of whether individual defendants may be personally liable as agents under the ADEA. *See Archer*, 833 F. Supp. at 214.

Other courts have held that the remedial goals of the ADEA are sufficiently advanced by employer liability, since vicarious liability of the sort envisioned by *respondeat superior* provides employers with ample incentives to control discriminatory conduct. *See, e.g., Miller*, 991 F.2d at 588 ("No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. An employer that has incurred civil damages because one of its employees believes he can violate Title VII

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[2] *Compare Coraggio v. Time Inc. Magazine Co.*, No. 94 Civ. 5429 (MBM), 1995 WL 242047, *9 (S.D.N.Y. 1995).

with impunity will quickly correct that employee's erroneous belief."). To the extent that congressional intent can be inferred from the text, structure and history of the statute, the background principles of *respondeat superior* and the specific definition of "employer" support the conclusion that Congress intended to hold employers, but not individual employees, liable for acts of discrimination in employment. Accordingly, defendants' motion to dismiss plaintiffs' claims under the ADEA is granted.[3]

II. *New York Human Rights Law*

The NYHRL prohibits an "employer" from discriminating on the basis of age. N.Y. Exec. Law § 296(1)(a) (McKinney 1993). The statute excludes from its reach "any employer with fewer than four persons in his employ," *id*, at § 292(5), and does not include the term "agent" in the definition of "employer." In *Patrowich v. Chemical Bank*, 63 N.Y.2d 541, 483 N.Y.S.2d 659, 473 N.E.2d 11 (1984), the New York Court of Appeals affirmed the dismissal of a complaint against an individual under the NYHRL and other state and federal statutes. The court made clear that an individual employee is not liable under the NYHRL if "he is not shown to have any ownership interest or any power to do more than carry out personnel decisions made by others." *See* 63 N.Y.2d at 542, 483 N.Y.S.2d at 660, 473 N.E.2d at 12. The complaints do not allege that any of the defendants has an ownership interest in Leslie Fay nor do they identify specific discriminatory employment decisions by any particular defendant with respect to particular plaintiffs other than conclusory allegations of a generalized "conspiracy" involving all defendants. (*See, e.g.*, Falbaum Amend. Compl. at ¶ 28) ("Defendants conspired among themselves and with others for the purpose of willfully

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[3] In *David v. Apfel, Levy, Zlotnick & Co.*, No. 91 Civ. 3384 (MGC), 1993 WL 245521, at *6 (S.D.N.Y. 1993), I accepted a supplemental Report and Recommendation from a magistrate judge to which objection was not made. To the extent that *David* is inconsistent with my decision in this case, it was erroneous.

discriminating against plaintiffs and others similarly situated on the basis of age.").

Plaintiffs point to the "aiding and abetting" and "retaliation" provisions of the statute, which they contend impose liability upon individuals. The NYHRL makes it unlawful for "any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or attempt to do so," *id.* at § 296(6), or for "any person engaged in any activity to which this section applies to retaliate or discriminate against any person because he has opposed any practice forbidden under this article." *Id.* at § 296(7). A "person" is defined as "one or more individuals" or "corporations." *Id.* at § 292(1). Defendants argue persuasively that the term "person" should be interpreted to exclude individuals in situations in which the parties stand within the scope of a common employment relationship—otherwise, they argue, the limitation embodied in the statutory definition of "employer" and in *Patrowich* could be easily evaded by alleging claims either under an aiding and abetting or retaliation theory. *Cf. Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1181 (S.D.N.Y. 1992) (denying motion to dismiss NYHRL claims against individual; noting that individual might be liable under aiding and abetting provisions "regardless" of employment relationship with corporate defendants). The various parts of a statute should be construed to give meaning to all. One clause should not be read to erase the rest. Accordingly, defendants' motion to dismiss the claims arising under the NYHRL is granted.

III. *Pennsylvania Human Relations Act*

The PHRA prohibits "any employer" from "discharg[ing] from employment" an individual because of "race, color, religious, creed, ancestry, age, sex, or non-job related handicap." Pa. Stat. Ann. tit. 43, § 955(a) (1991 & Supp. 1994). An employer under the Act is defined as "any person employing four or more persons within the Commonwealth" of Pennsylvania. *Id.* at § 954(b). Like the NYHRL, the PHRA

does not use the term "agent," but it does make it unlawful for "any person" to discriminate because an individual "has opposed any practice forbidden by this act," *id.* at § 955(d), or to "aid, abet, incite, compel or coerce the doing of any act" prohibited by the statute. *Id.* at § 955(e). A "person" is defined in the statute as "one or more individuals, partnerships, associations, organizations, legal representatives, trustees in bankruptcy or receivers." *Id.* at § 954(a).

Neither side has identified any Pennsylvania state court decision that addresses whether the PHRA permits individual liability for employees. A Pennsylvania federal district court has held that individual liability is not available under either the ADEA or the PHRA. *Violanti v. Emery Worldwide A-CF Co.*, 847 F. Supp. 1251, 1257 (M.D. Pa. 1994); *see also Barb v. Miles, Inc.*, 861 F. Supp. 356, 359 & n.1 (W.D. Pa. 1994) (no individual liability under Title VII or PHRA). In light of these decisions, and for the reasons discussed above in connection with the ADEA and NYHRL claims, defendants' motion to dismiss the claims under the PHRA is granted.

IV. *New York City Civil Rights Law*

Section 8-107(1)(a) of the Administrative Code of the City of New York makes it an unlawful discriminatory practice for "an employer *or an employee* or agent thereof, because of the actual or perceived age . . . of any person . . . to discharge from employment such person." Admin. Code of City of New York § 8-502(c) (1986 & Supp. 1994) (emphasis added). Section 8-102(5) defines an "employer" as excluding "any employer with fewer than four persons in his or her employ." Nevertheless, in view of the plain language of the statute, defendants do not argue that they may not be liable as "employees" under the statute. However, they contend that plaintiffs failed to comply with Section 8-502(c), which requires that "[p]rior to commencing a civil action [for unlawful discriminatory practices] . . . the plaintiff shall serve a copy of the complaint upon the city commission on human rights and the corporation counsel." Plaintiffs have

submitted an affidavit and documentation which demonstrate that they did comply with this requirement. (Aff. of Michael Prince at ¶3 and Exhs. A-H).

Defendants also assert without further elaboration, that to the extent that plaintiffs state a claim under the NYCCRL, it would interfere with federal and state law and should therefore be dismissed. The case upon which they rely, *Chambers v. Capital Cities/ABC*, 851 F. Supp. 543 (S.D.N.Y. 1994), does not support their position. *Chambers* involved a claim of age discrimination violation of the ADEA, the NYHRL, and the NYCCRL in which the court dismissed the NYCCRL claim only to the extent that the plaintiffs sought punitive damages.[4] Accordingly, defendants' motion to dismiss the claims under the NYCCRL on the face of the complaint is denied.

*Conclusion*

For the foregoing reasons, defendants' motion to dismiss the claims under the ADEA, NYHRL and PHRA is granted, but motion to dismiss the claims under the NYCCRL is denied.

SO ORDERED.

Dated: New York, New York
July 24, 1995

/S/ MIRIAM GOLDMAN CEDARBAUM
MIRIAM GOLDMAN CEDARBAUM
United States District Judge

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[4] Unlike this diversity case, jurisdiction in *Chambers* was based only on a federal question. The NYHRL and NYCCRL claims were included as pendent claims.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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Chapter 11 Case No. 93-B-41724 (TLB)
(Jointly Administered)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

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DECISION ON UNITED STATES TRUSTEE'S MOTION TO DISQUALIFY WEIL, GOTSHAL & MANGES AS DEBTORS' COUNSEL AND TO IMPOSE AN ECONOMIC SANCTION AGAINST WEIL, GOTSHAL & MANGES

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TINA L. BROZMAN
UNITED STATES BANKRUPTCY JUDGE

Rarely am I faced with a motion as troubling as this one, the United States Trustee's motion to disqualify Weil, Gotshal & Manges ("Weil Gotshal"), the debtors' counsel, from further representation of its clients and to deny the firm fees because of its failure to disclose what the United States Trustee ("U.S. Trustee") dubs disabling conflicts. The motion is predicated upon the report of an examiner who had concluded that Weil Gotshal was not disinterested when retained and had failed to reveal to the court connections which led to his conclusion. I am in accord with the examiner's assessment, although I do not share his view that the appropriate sanction is limited to imposition on Weil Gotshal of a portion of the costs which he incurred investigating Weil Gotshal's status. Indeed, it is the nature of the sanction which is the troubling element here for, as the examiner found, Weil Gotshal has rendered services competently and loyally to the debtors, notwithstanding it derelictions in the area of disclosure, and the debtors undoubtedly will be harmed by Weil Gotshal's complete removal from the case some twenty

months into the reorganization effort. This fear of harm to the debtors is shared by both official committees as well as the examiner.

## I.

### A. *Background*[1]

The Leslie Fay Companies, Inc. ("Leslie Fay") is a large, publicly-owned corporation primarily engaged in designing, manufacturing, and selling women's dresses, suits, and sportswear. It is one of the few large American clothing manufacturers which still manufactures in the United States.

On January 29, 1993, Leslie Fay's controller, Donald Kenia, disclosed to senior management that he had been making unsupported entries into Leslie Fay's general ledger, resulting in a significant misstatement of its financial standing. Two days later, senior management informed Leslie Fay's board of directors (the "Board" or "Board of Directors") which in turn disclosed the existence of the false entries to the general public.

The Board directed its adult committee (the "Audit Committee") to conduct an investigation into the facts and circumstances surrounding the accounting irregularities. At the time, the Audit Committee was composed of three independent, non-management directors: Ira J. Hechler, a private investor; Ralph Destino, Chairman of Cartier, Inc.; and Michael L. Tarnopol, a senior officer at Bear Stearns & Co. ("Bear Stearns"). The Board then appointed Steven Friedman, the only other outside director of Leslie Fay, to join Hechler, Destino, and Tarnopol on the Audit Committee and in their investigation of the accounting irregularities. Friedman is a senior manager of Odyssey Partners L.P. ("Odyssey"), a large partnership that acts principally as a merchant bank.

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[1] The parities do not dispute the facts, most of which are drawn from the examiner's report or the court's own file.

Included in the Audit Committee's charter were the identification of all parities who may have been involved in the accounting irregularities and the consideration of possible legal claims that could be asserted on behalf of Leslie Fay. Toward those ends, the Audit Committee retained the accounting firm of Arthur Anderson & Co. and Weil Gotshal. Prior to its retention by the Audit Committee, Weil Gotshal had not done any work for Leslie Fay, whose general outside counsel was the law firm of Parker, Chapin, Flattau & Klimpl ("Parker Chapin").

In late February, 1993, the Audit Committee issued preliminary results of its work, announcing that Leslie Fay's 1991 profits had been overstated by over $12 million. Accordingly, the accounting firm of BDO Seidman ("Seidman"), Leslie Fay's independent auditors, officially withdrew its signature from Leslie Fay's 1991 financial statements. The Audit Committee had also learned by this point that Kenia's initial representation that he alone was responsible for the false entries was not true. As was later confirmed, the fraud reached to Leslie Fay's chief financial officer, Paul Polishan.

B. *Weil Gotshal's Court-Approved Retention and the Subsequent Questions*

The consequences of this burgeoning scandal were calamitous to Leslie Fay. Lenders and suppliers froze its credit lines, and Leslie Fay was unable to secure the financing necessary for the continued operation of its business. This led to an expansion of Weil Gotshal's role to include advise on financial restructing. On April 5, 1993, nine weeks into the Audit Committee's investigation, Weil Gotshal filed chapter 11 petitions on behalf of Leslie Fay and its affiliates (the group referred to for convenience as "Leslie Fay"). The same day, Weil Gotshal submitted an application for retention as counsel for the debtors in possession, which was approved by the Hon. Cornelius Blackshear of this court. The order contemplated that Weil Gotshal would continue in its work for the Audit Committee as part and parcel of its representation of

the debtors. The U.S. Trustee, the only party in interest to receive notice, had indicated that he did not object to the retention.

By late September, the Audit Committee completed its investigation, and on September 27, 1993, it disclosed its findings to the Board of Directors. The Audit Committee concluded that there was no evidence that any member of the debtors' current[2] senior management or the Board of Directors knew of or participated in the fraudulent entries, which it estimated totalled some $160 million. The Audit Committee also discovered, contrary to what was originally believed, that the accounting irregularities dated back to at least 1990. These findings were made public on September 29, 1993.

At just about this time, questions regarding Weil Gotshal's disinterestedness were raised by the official committee of unsecured creditors (the "Creditors' Committee"). A hearing on first interim fee applications had been set for November 4, 1993. Both the Creditors' Committee and the U.S. Trustee filed objections to Weil Gotshal's request for fees on the grounds that Weil Gotshal was not disinterested as required by 11 U.S.C. § 327(a)[3] (title 11 of the United States Code hereafter referred to as the "Code") and had failed to file a full and complete disclosure as required by Fed.R.Bank.P. 2014.[4]

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[2] By this time, Polishan was no longer Leslie Fay's chief financial officer.

[3] Section 327(a) provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

The requirements of the section apply equally to a debtor in possession by virtue of section 1107 of the Code. *See* 2 L. King, *Collier on Bankruptcy*, ¶ 327.01 at n.1a (15th ed. 1994).

[4] Rule 2014 deals with applications for professional employment in bankruptcy cases and requires "a verified statement of the person to be employed setting forth the person's connections with the debtor, credi-

Weil Gotshal responded to the objections by asserting that it had met the Code's disinterestedness requirement and had fully satisfied its disclosure obligations in its retention affidavit. In addition, Weil Gotshal submitted a supplemental affidavit containing information regarding certain of its previously-undisclosed relationships that had been questioned by the Creditors' Committee.

C. *Appointment of the Examiner*

On December 2, 1993, in response to the cloud hovering over Weil Gotshal's representation of the debtors, Leslie Fay moved for the appointment of an examiner to look into Weil Gotshal's disclosure and disinterestedness and the veracity of the Audit Committee's report in light of those issues. The Creditors' Committee agreed that I should appoint an examiner, but asked that the scope of the examiner's retention be expanded beyond that proposed by Leslie Fay. On December 16, 1993, I ordered the appointment of an examiner who would be charged with two tasks, the first of which was

> undertak[ing] such investigation and analyses as are necessary to formulate a recommendation to the Court as to whether the law firm of Weil, Gotshal & Manges, in its capacity as attorneys for the Debtors in Possession herein, under the circumstances of these chapter 11 cases and in accordance with section 327 of the Bankruptcy Code and Rule 2014 of the Federal Rules of Bankruptcy Procedure, is disinterested or holds or represents an interest adverse to the Debtors' estates or made adequate disclosure.

The second task assigned to the examiner was to evaluate whether (i) there were any viable claims that could be asserted against any other parties in connection with the accounting irregularities that could increase the size of the

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tors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee."

chapter 11 estate and; (ii) whether the Audit Committee's work in that regard had been acceptable or if further investigating was necessary. I approved the appointment of Charles A. Stillman as examiner on January 18, 1994. Over the next six months, the examiner conducted a thorough investigation into Weil Gotshal's alleged conflicts and into the Audit Committee's investigation of the accounting irregularities.

D. *What the Examiner Found*

1. *The Audit Committee Membership*

The disclosure of the accounting irregularities in early 1993 promoted a flurry of litigation. Weil Gotshal represented the Audit Committee members with respect to some of these matters. Class actions were filed charging certain officers and directors, including members of the Audit Committee, with securities fraud (the "Securities Fraud Litigation"), on the grounds that, as members of the Audit Committee, they knew or should have known of the irregularities, and that the irregularities caused a precipitous drop in the price of Leslie Fay stock. Weil Gotshal represented the Audit Committee in these actions, negotiating an agreement to drop the members' names from the litigation, subject to certain conditions. In addition, a shareholder's derivative suit was commenced in state court (the "Derivative Suit"), charging the Audit Committee with essentially the same impropriety that the Securities Fraud Litigation alleged. Weil Gotshal accepted service of process on behalf of the Audit Committee members, but had done nothing more with regard to this lawsuit prior to Weil Gotshal's retention in the chapter 11 cases.[5]

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[5] The Justice Department got into the act as well, commencing an investigation into the accounting fraud at Leslie Fay. The Audit Committee assured the United States Attorney of its intent to fully cooperate with the investigation. Typically, Weil Gotshal was responsible for responding to information requests by the U.S. Attorney on behalf of the Audit Committee.

2. *Weil Gotshal's Relationships With the Potential Targets of Its Investigation*

Whereas prior to Weil Gotshal's retention by the Audit Committee, it had never represented Leslie Fay, it did maintain professional and personal relationship with parties that had an interest in the outcome of the Audit Committee investigation. Yet none of these relationships was disclosed to the court.

(a) *Tarnopol/Bear Stearns*

Michael L. Tarnopol is a director of Leslie Fay and was a member of the Audit Committee throughout the period when the accounting irregularities were taking place. He is also a senior officer at Bear Stearns. Bear Stearns, a large investment bank, is a valuable client of Weil Gotshal, and was so at the time of Weil Gotshal's retention by Leslie Fay. Weil Gotshal admitted to the examiner that it would not initiate a lawsuit against Bear Stearns on behalf of another client without Bear Stearns' consent.

Bear Stearns was the lead underwriter in a secondary public offering of 2.1 million shares of Leslie Fay stock, then valued at approximately $40 million (the "Stock Sale") in June, 1991, well after the accounting irregularities began.

The examiner concluded that Tarnopol was a potential target of the Audit Committee's investigation.

(b) *Friedman/Odyssey*

Steven Friedman is a director of Leslie Fay who was appointed to the Audit Committee when the accounting irregularities came to light. At the time of Weil Gotshal's retention, he was also a general partner of Odyssey. Odyssey is another longstanding client of Weil Gotshal, one against whom Weil Gotshal also would not initiate suit absent the client's consent. Additionally, Odyssey and Friedman were the owners of the 2.1 million shares that were the subject of the Stock Sale.

Weil Gotshal also represented Friedman personally, providing him with estate planning services in 1988 and 1989. It has done the same for other Odyssey partners. Moreover, two other Odyssey partners had served on Leslie Fay's Board of Directors during the period of the accounting irregularities.

The examiner found that Friedman, like Tarnopol, was a potential target of the Audit Committee's investigation.

(c) *BDO Seidman*

Seidman was Leslie Fay's independent auditor during the period of the accounting irregularities. It was Seidman that had certified Leslie Fay's false financial statements. That Seidman was a natural target of the Audit Committee's investigation is obvious. Not surprisingly, Seidman was a party to both the Securities Fraud Litigation and the Derivative Suit. Seidman is also a Weil Gotshal client, albeit on a much smaller scale than Bear Stearns or Odyssey. Weil Gotshal has represented Seidman in two matters. One matter involved the non-public investigation of a former Seidman client by a federal regulatory agency. Weil Gotshal assisted Seidman in furnishing documents requested by that Agency. That matter was inactive at the time of Weil Gotshal's retention by Leslie Fay. Weil Gotshal also represented Seidman in a malpractice lawsuit commenced against Seidman in June, 1992. As of the date of Weil Gotshal's retention by court order, the case was still active, although the amount of fees involved in that case was relatively small.

3. *Weil Gotshal's Undisclosed Representation of Leslie Fay's Seventh Largest Creditor*

At the time of Weil Gotshal's retention, Forstmann & Co. ("Forstmann") was Leslie Fay's seventh largest creditor, with a claim of approximately $700,000. It subsequently sold its claim and resigned from the Creditors' Committee. Weil Gotshal was general outside counsel to Forstmann through 1991 and since then has served Forstmann in a more limited role,

nonetheless continuing to represent Forstmann on a variety of matters.

E. *The Extent of Weil Gotshal's Disclosure*

In connection with Weil Gotshal's retention application of April 5, 1993, Alan B. Miller, a partner of the firm, submitted an affidavit of retention to the court in which he professed that, to the best of his knowledge, Weil Gotshal did not "hold[ ] or represent[ ] any interest adverse to the debtors or their estates in the matters upon which [Weil Gotshal] was to be employed." The affidavit disclosed that Weil Gotshal had been working for the Audit Committee, had counseled Leslie Fay with regard to its efforts to restructure its debt, and had assisted it in the filing of the chapter 11 petitions. The affidavit also disclosed generally that Weil Gotshal represented entities that were "claimants of the Debtors in matters totally unrelated to the Debtors' cases." Some examples of those claimants were listed, although Forstmann was not one of them. (Even after the Creditors' Committee was formed and Forstmann was made a member, Weil Gotshal did not disclose its representation of Forstmann.) In addition, the affidavit contained the boilerplate statement that Weil Gotshal was involved in numerous unrelated matters with attorneys and accountants that represented parties-in-interest in the chapter 11 cases, but that none of those relationships was adverse to Leslie Fay.

Weil Gotshal did not disclose, however, that it had professional relationships with individual Audit Committee members. It did not disclose that it represented Bear Stearns and Odyssey, and that those companies were connected to Friedman and Tarnopol, respectively. It did not disclose Bear Stearns' and Odyssey's relationship to the Stock Sale. Similarly, Weil Gotshal did not disclose its relationship with Seidman, despite the fact that, even at the time, Weil Gotshal recognized that Leslie Fay might have claims against Seidman.

F. *The Examiner's Conclusions*

The examiner concluded that "Weil Gotshal was not disinterested in the matter, and did not make proper disclosure, as mandated by the Bankruptcy Code and related provisions." (Ex. Report at 3). Specifically, he found that Weil Gotshal had failed to disclose its relationship to two of the members of the Audit Committee and the firms of which they were partners, to Seidman and to one of the debtors' largest unsecured creditors. And he concluded that these undisclosed relationships, if known, would have cast substantial doubt on whether Weil Gotshal could conduct a fair and impartial investigation for the Audit Committee.[6] However, he also found that "[t]he conflict presented [was] principally one of perception: under all the circumstances, there [was] a fair perception that because of multiple representations and client relationships, Weil Gotshal would be unable to act solely in the debtors' best interests." (Ex. Report at 3). According to the examiner, Weil Gotshal caused the debtors no actual injury, and represented them in an exemplary fashion. Thus, he concluded, the appropriate sanction would be the disallowance out of future fees of some of the cost of his investigation into Weil Gotshal's disinterestedness and disclosure, but he recommended that "disqualifying Weil Gotshal, or imposing a sanction beyond such limited allowance of fees, [was] not warranted." *Id.*

II.

The U.S. Trustee took a different view of things and on October 19, 1994, moved to disqualify Weil Gotshal from serving as counsel to the debtor in possession and for the imposition of economic sanctions. The U.S. Trustee bases his motion upon the findings of the examiner, disagreeing, how-

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[6] However, he did not believe that the Forstmann connection presented a conflict. I concur in that view, but believe that it should have been disclosed nonetheless pursuant to Rule 2014.

ever, with his conclusion that no actual harm accrued to Leslie Fay. Although the U.S. Trustee does not question the examiner's opinion that Weil Gotshal vigorously represented Leslie Fay, he believes that Weil Gotshal's asserted lack of disinterestedness called the integrity of the Audit Committee's investigation into question, regardless of how thoroughly the investigation was actually performed. According to the U.S. Trustee, "when the credibility of an action by the Debtors' counsel is an integral element of the very task to be performed—as it was in this case—any "conflict" which exists in performing that function causes actual harm." (U.S. Trustee Mot. to Disqualify at 20).

In response to the U.S. Trustee's motion, Weil Gotshal vigorously denies that it ever had any conflict of interest or that it did not meet its disclosure obligations. In Weil Gotshal's view, "the U.S. Trustee's allegations are simply wrong as a matter of fact and law." (Weil Gotshal Memorandum of Law at 2). Trying to turn the defense of its actions into an attack on the motives of those who have raised any question, Weil Gotshal has labeled the initial Creditors' Committee challenge as a pressure tactic and the U.S. Trustee's motion as a vindictive action prompted by certain newspaper articles which must have been unsettling to the Trustee. This is somewhat startling given the existence of a report by an independent examiner which concluded that there was substance to the concerns first voiced by the Creditors' Committee.

Perhaps ironically, the Creditors' Committee now opposes the U.S. Trustee's motion, at least to the extent that it seeks to disqualify Weil Gotshal.[7] As mentioned earlier, the Creditors' Committee fears grave harm to Leslie Fay, and, by extension, its creditors, stockholders and employees, should Weil Gotshal be disqualified. The Committee's preferred remedy is an economic sanction. The Official Committee of Equity Security Holders (the "Equity Committee") essentially

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[7] Since the time that the Creditors' Committee first challenged Weil Gotshal's entitlement to fees, the membership of that committee has almost completely changed. Also changed is the identity of its counsel.

concurs with the Creditors' Committee, admitting that disclose was not complete but recommending that disqualification is unwarranted.

III.

There are two grounds upon which the U.S. trustee bases his motion, first, that Weil Gotshal did not make the complete disclosure mandated by Fed.R.Bankr.P. 2014 and second, that Weil Gotshal was in fact not disinterested at the time of its retention in the chapter 11 cases, in violation of section 327(a) of the Code. The legal standards governing each theory are distinct and deserve separate attention. The facts to which the law must be applied will follow the discussion of the legal standards.

A. *Legal Standards Governing Retention*

Section 327(a) of the Code, quoted earlier in this decision, seemingly imposes two requirements on a trustee or debtor in possession seeking to employ counsel: (i) that the attorney does not hold or represent an interest adverse to the estate and (ii) that the attorney is disinterested. The world "disinterested" is a term of art, defined in section 101(14) of the Code as, among other things, not having "an *interest materially adverse* to the interest of the estate . . ." (emphasis added). It is from this immediately apparent that the statutory definition of "disinterested" includes the first prong of the requirements for retention under section 327(a) (although the definition of "disinterested" includes the concept of materiality which is not mentioned in section 327). Thus, the First Circuit has noted that "the twin requirements of disinterestedness and lack of adversity telescope into a single hallmark." *In re Martin*, 817 F.2d 175, 181 (1st Cir. 1987); *see also In re BH & P, Inc.*, 949 F.2d 1300, 1314 (3d Cir. 1991).

The requirements of section 27 cannot be taken lightly, for they "serve the important policy of ensuring that all profes-

sionals appointed pursuant to [the section] tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities." *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir. 1994). "Once counsel is employed, "a lawyer owes his allegiance to the entity and not to the stockholder, director, officer, employee, representative or other person connected with the entity.' " *In re Grabill Corp.*, 113 B.R. 966, 970 (Bankr. N.D.Ill. 1990) *quoting In re King Resources Co.*, 20 B.R. 191, 200 (D.Col. 1982). Concern with the proper attention to fiduciary obligation has prompted a major treatise on bankruptcy to observe that section 327's standards "are to be rigidly applied." 2 L. King, *Collier on Bankruptcy*, ¶327.03 (15th ed. 1994).

The Code does not attempt to define what constitutes an adverse interest. However, interests are not considered "adverse" merely because it is possible to conceive a set of circumstances under which they might clash. *See TWI International, Inc. v. Vanguard Oil and Service Co.*, 162 B.R. 672, 675 (S.D.N.Y. 1994) (conflicts that are "hypothetical or theoretical" not a basis for disqualification); *In re Kelton Motors, Inc.*, 109 B.R. 641, 650 (Bankr. D.Vt. 1989). The more difficult area is when a live conflict of interest has not quite emerged, yet the factual scenario is sufficiently susceptible to that possibility so as to make the conflict more than merely "hypothetical or theoretical." The courts have been far from uniform in the way they have formulated tests for dealing with this type of situation.

A handful of courts has held or implied that only "actual," and not "potential," conflicts of interest are disabling. *See In re Stamford Color Photo, Inc.*, 98 B.R. 135, 137-38 (Bankr. D.Conn. 1989); *H & K Developers, Inc. v. Waterfall Village of Atlanta, Ltd. (In re Waterfall Village of Atlanta, Inc.)*, 103 B.R. 340, 344 (Bank. N.D.Ga. 1989); *see also*, Comment, *Bankruptcy Code Section 327(a) and Potential Conflicts of Interest—Always or Never Disqualifying?*, 29 Hous. L. Rev. 433 (1992). A greater number of courts, including some in this district, have concluded that even "potential" conflicts of

interest are disabling. *See In re Codesco, Inc.*, 18 B.R. 997, 999 (Bankr. S.D.N.Y. 1982) ("There should be no *opportunity* for the exercise of conflicting interests. . . ." [emphasis added]); *In re Proof of the Pudding, Inc.*, 3 B.R. 645, 647 (Bankr. S.D.N.Y. 1980); *see also Bohack Corp. v. Gulf & Western Industries, Inc. (In re Bohack)*, 607 F.2d 258, 263 (2d Cir. 1979). Yet other courts have been critical of the very distinction between actual and potential conflicts. *See, e.g., In re Kendavis Industries, Inc.*, 91 B.R. 742, 744 755-56 (Bankr. N.D.Tex. 1988). Recently, in *TWI International*, decided in the Southern District of New York, 162 B.R. at 675, the district court stated that " 'disqualification should be mandated when an actual, as opposed to hypothetical or theoretical, conflict is present. This in no way precludes disqualification for a potential conflict. The test is merely one of a *potential actual* conflict.' " *Id., quoting In re Wm. J. O'Connor*, 52 B.R. 892 897 (Bankr. W.D.Okl. 1985).

The debate over this issue may be more semantic than substantive, for a close review of the cited cases indicates that the results were largely driven by the facts of each case. And indeed, in the context of section 327, that is precisely the way it should be. *See Iannotti v. Manufacturers Hanover Trust Co. (In re New York, New Haven & Hartford Railroad Co.*, 567 F.2d 166, 175 (2d Cir. 1977) (no "mandatory requirement that reorganization courts woodenly must deny compensation in every case of conflict of interest, regardless of the facts."); *Interwest Business Equipment, Ltd. v. United States Trustee (In re Interwest Business Equipment, Ltd.)*, 23 F.3d 311, 315 (10th Cir. 1994) (citing several cases for proposition that bankruptcy court has broad discretion in disqualification cases); *In re Garza*, 1994 WL 282570 *2, (Bankr. E.D.Va. Jan. 19, 1994) ("[C]ourts have generally declined to formulate bright-line rules concerning the criteria for disqualification, favoring instead an approach which evaluates the facts and circumstances of each particular case."). Potential conflicts, no less than actual ones, can provide motives for attorneys to act in ways contrary to the best interests of their

clients. Rather than worry about the potential/actual dichotomy it is more productive to ask whether a professional has "either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors—an incentive sufficient to place those parties at more than acceptable risk—or the reasonable perception of one." *In re Martin*, 817 F.2d at 180-81. In other words, if it is plausible that the representation of another interest may cause the debtor's attorneys to act any differently than they would without that other representation, then they have a conflict and an interest adverse to the estate.

B. *Legal Standards Governing Disclosure*

Fed.R.Bankr.P. 2014 requires that a professional seeking employment in a bankruptcy case submit a "verified statement. . . setting forth the person's connections" to the debtor, creditors and any other party in interest. The purpose of Rule 2014, as expressed by the *Collier* treatise,

> is to provide the court (and the United States Trustee) with information necessary to determine whether the professional's employment meets the broad test of being in the best interest of the estate. To that end, a failure to disclose any fact which may influence the court's decision may result in a later determination that disclosure was inadequate and sanctions should be imposed on the professional. The fact that disclosure was made elsewhere (e.g. in the debtor's schedules) is not likely to ameliorate a court's reaction to incomplete disclosure.

8 L. King, *Collier on Bankruptcy*, ¶ 2014.03 (15th ed. 1994). Rule 2014 disclosure requirements are to be strictly construed. *Id.*; *Rome v. Braunstein*, 19 F.3d at 59; *In re Arlan's Dep't Stores, Inc.*, 615 F.2d 925, 933 (2d Cir. 1979) (decided under substantially similar predecessor to Rule 2014.). All facts that may have any bearing on the disinterestedness of a professional must be disclosed. Consistent with the duty placed on the professional, it is the responsibility of the pro-

fessional, not of the court, to make sure that all relevant connections have been brought to light. *See, e.g., Rome v. Braunstein*, 19 F.3d at 58-60; *In re Glenn Electric Sales*, 99 B.R. 596, 599 (D.N.J. 1988). *Diamond Lumber, Inc. v. Unsecured Creditors' Committee (In re Diamond Lumber, Inc.)*, 88 B.R. 773, 776 (N.D.Tex. 1988). So important is the duty of disclosure that the failure to disclose relevant connections is an independent basis for the disallowance of fees or even disqualification. *See Futuronics Corp. v. Arutt, Nachamic & Benjamin (In re Futuronics Corp.)*, 655 F.2d 463, 469 (2d Cir. 1981); *In re Arlan's*, 615 F.2d at 933; *Rome v. Braustein*, 19 F.3d at 59. *In re Granite Sheet Metal Works, Inc.*, 159 B.R. 840, 847 (Bankr. S.D.Ill. 1993); *In re Envirodyne Industries, Inc.*, 150 B.R. 1008, 1021 (Bankr. N.D.Ill. 1993).

C. *The Application of the Law to the Facts*

*1. Weil Gotshal Represented Interests that were Materially Adverse to the Debtors at the Time of its Retention.*

Leslie Fay's bankruptcy, while certainly not unique, was at least unusual in that it was a direct consequence of fraud that had been perpetrated against the company, its shareholders, and its creditors. When the petitions were filed on April 5, 1993, the Audit Committee was far from completing the investigation it had undertaken; thus there was no way to be sure of the extent of the irregularities, or whether others besides Kenia and Polishan may have been involved. The Justice Department had already begun a criminal investigation into the fraud, and private party civil suits had also been commenced naming, among others, Leslie Fay's directors and its accountants. Because Weil Gotshal was requesting retention not only as Leslie Fay's general bankruptcy counsel but also to complete an investigation into a fraud which may have reached into senior management or even the board of directors, it was especially important that the court ensure that counsel was completely disinterested. Thus, it was incumbent

upon Weil Gotshal to be particularly thorough in its retention affidavit. Unfortunately, Weil Gotshal failed to give the court the ability to consider whether the firm had disabling conflicts. At the time of its retention, Weil Gotshal had significant ties to three potential targets of investigation, and yet told neither the court nor the U.S. Trustee.

Weil Gotshal's connections to Tarnopol and Friedman were not insignificant, as Weil Gotshal would have this court find. Both held positions in the highest tiers of Bear Stearns and Odyssey, respectively, which were large and valuable clients of Weil Gotshal. Thus, Weil Gotshal had a perceptible economic incentive not to pursue the possibility of claims against Tarnopol and Friedman with the same vigor and intensity it might have otherwise applied.

Weil Gotshal does not deny that it would not have been disinterested had there been viable claims against Tarnopol and Friedman, but rather contends that by the time it had been retained on April 5, it was clear that no such claims existed. This is said to be so for a number of reasons. First, the Audit Committee was already nine weeks into its investigation, and no evidence had turned up to implicate the Audit Committee or the Board of Directors. Second, according to Weil Gotshal, the scope of liability for outside directors under Delaware law is so narrow that any claims against them were "speculative and hypothetical." I disagree on both counts.

Weil Gotshal relies heavily on the fact that,

> [d]uring the interviews conducted prior to the commencement of chapter 11 proceedings, Mr. Kenia admitted that the adjustments to Leslie Fay's financial records were made at his direction. He also stated that the adjustments were made without the knowledge or participation of the independent auditors or the Board of Directors.

(Weil Gotshal Memo. of Law in Opposition to U.S. Trustee's Motion at 34). It is amazing that Weil Gotshal would give so much weight to the "admission" of a man who had committed wholesale fraud upon the company whose finances it was his

job to protect, and who had already lied at least once by denying Polishan's involvement in the fraud. As it so happens, it was later discovered "that the adjustments had taken place over a longer time than previously asserted by Mr. Kenia." (Weil Gotshal Memo. of Law at 14) further confirmation that Kenia was not to be taken at his word.[8] Moreover, I am unpersuaded that Weil Gotshal could have been certain of the outcome of the Audit Committee's investigation in April, when that investigation would not be completed until September. By its own admission, Weil Gotshal did not realize the full scope of the accounting irregularities until the middle of May. *Id.* In light of all this, Weil Gotshal's claims that it knew at the time of its court-approved retention that the outside directors could not have been liable rings hollow.

It is true that the outside directors had significant protections under Delaware law, *see generally*, Donald E. Pease, *Outside Directors: Their Importance to the Corporation and Protection from Liability*, 12 Del. J. Corp. L. 25 (1987), but that is a far cry from saying that they could under no circumstances have been found liable. For example, because the investigation was not nearly completed as of the petition date, it is was impossible to say for certain that the directors had not been "reckless," which, as the examiner pointed out and Weil Gotshal did not deny, might provide a basis of liability under Delaware law. *See, e.g., Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1312 (3d Cir. 1993); *Solash v. Telex Corp.*, 1988 WL 3587, *8 (Del. Ch. Jan. 19, 1988). Apparently, the outside directors thought enough of their potential liability to file indemnification claims against Leslie Fay in this court. At any rate, I do not deny that Weil Gotshal may have had an honest belief in the likely immunity of Leslie Fay's outside directors. "The point, however, is that such a determination must be made by the counsel who is in a position to make an inde-

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[8] This means, too, that Weil Gotshal could not and did not know when it was retained by court order whether Leslie Fay might have any claims against Bear Stearns, Odyssey and Friedman arising out of the Stock Sale, another area in which Weil Gotshal had entanglements.

pendent judgment." *Bohack*, 607 F.2d at 263. And here, the attorneys with the entanglements were the ones who were determining whether Leslie Fay would have claims against the outside directors. Vis-à-vis two of those directors, Weil Gotshal had an adverse interest because it had an incentive to discount any possible liability so as to preserve its substantial client relationships with the firms of which the directors were principals. And with respect to Friedman, Weil Gotshal had represented him personally, wholly separate and apart from his affiliation with Leslie Fay.

I also find that Weil Gotshal was not disinterested relative to Seidman. Seidman was Leslie Fay's independent auditor throughout the period of the irregularities, and was therefore a very obvious target of potential plaintiffs. Indeed, Seidman was named in both the Derivative Suit and the Securities Fraud Litigation. Weil Gotshal does not deny this, nor does it deny that Leslie Fay may still have claims against Seidman.[9] Rather, it defends its disinterestedness by pointing to the relative insignificance of Seidman as a client to Weil Gotshal. (At the time of Leslie Fay's chapter 11 filing, Weil Gotshal was representing Seidman with regard to two matters, one of which was already inactive and one which subsequently became so, and the total fees in those cases approximated $40,000.) The short answer to this is that Weil Gotshal should be presumed to be loyal to its client. That the client may not be a major client is no reason to think that Well Gotshal would ignore the relationship.

In any event, the size of the billing is irrelevant for another reason as well. Dennis J. Block, a Weil Gotshal partner, admitted in a deposition conducted by the examiner that Weil Gotshal would not have sued Seidman even if the facts warranted it. This, stated Block, was because Weil Gotshal represented accountants and "as a matter of Weil Gotshal policy," would therefore "not sue an accounting firm, period." (Dep.

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[9] These potential claims are currently being evaluated by counsel to the Creditors' Committee, which took responsibility for these claims after Weil Gotshal's possible conflicts with regard to them came to light.

of Dennis J. Block at 126-27). Block testified that Weil Gotshal "told the audit committee and the board" of this policy, and had further told them:

> [I]f in fact it turned out that there would be a reason to take action against Seidman we would look at the facts, we'd tell them what the facts are but that would be something, ultimately, one, [sic] we'd be unwilling to handle because we don't sue accounting firms and that would be something that the company would have to deal with other counsel on.

*Id.* at 127. Although Weil Gotshal told the Audit Committee about its policy, it elected not to impart this important information to either myself or the U.S. Trustee, an omission that is simply inexcusable. There are two problems with Well Gotshal's nondisclosure. Certainly that information was relevant to whether Weil Gotshal's retention was in the best interest of the estate given that it would not sue Seidman and retention of special counsel might have entailed additional cost to the estate. But in addition, this undisclosed condition of employment particularly when coupled with a client relationship with Seidman cast doubt on whether Weil Gotshal was the proper independent counsel to conduct the investigation into Seidman's conduct and possible liability. An unbiased investigation of the facts is no less crucial than an unbiased evaluation of the law in assessing potential claims. By unilaterally reserving the role of investigating Seidman to itself, Weil Gotshal created the "opportunity for the exercise of [its] conflicting interests," by projecting the facts in a light more favorable to Seidman than it should have. *In re Codesco*, 18 B.R. at 999. I do not say that Weil Gotshal actually did that, nor do I mean to disparage Weil Gotshal's integrity by suggesting that it probably would have. But when evaluating conflicts of interest, I must do so objectively, "irrespective of the integrity of the person under consideration." *In re Martin*, 817 F.2d at 181.

As Judge Friendly noted in *In re Ira Haupt & Co.*, 361 F.2d 164, 168 (2d Cir. 1966), quoted with approval in *Bohack*, 607 F.2d at 263, "[t]he conduct of bankruptcy proceedings not only should be right but must seem right." And here, Weil Gotshal's conduct of an investigation where it had undisclosed ties to three of the targets just does not seem right. The better solution, as I will expand upon shortly, would have been for Weil Gotshal to decline the Audit Committee's representation. But in any case, once Leslie Fay filed for chapter 11 relief, it was no longer Weil Gotshal's decision to make. It was for the court, and not Weil Gotshal, to determine whether in fact a conflict existed and, if so, what the remedy should be. The "decision should not be left to counsel, whose judgment may be clouded by the benefits of potential employment." *Rome v. Braunstein*, 19 F.3d at 59 (citation omitted).

Weil Gotshal was also connected with Forstmann, Leslie Fay's seventh largest creditor, but I do not believe that those connections are sufficient to tender Weil Gotshal interested with regard to Forstmann.

Section 327(c) of the Code provides that

> . . . a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.

Based the U.S. Trustee's submissions on his disqualification motion, it is not clear to me that the U.S. Trustee actually objects to Weil Gotshal's retention on the grounds of its Forstmann connection. However, I do not believe that Weil Gotshal's representation of Forstmann on unrelated matters constituted an actual conflict of interest in any case. At the time of its retention, Weil Gotshal was no longer Forstmann's regular counsel and there has been no showing that Forstmann was adverse to Leslie Fay. Had there been a problem with Forstmann's claim or had Forstmann been the recipient of an

alleged voidable transfer, other counsel, such as Parker Chapin (the debtors' general counsel), could have handled the matter. In other words, any possible problem with Forstmann did not go to the heart of what Weil Gotshal was retained to do. This is not to say, however, that Weil Gotshal was free to keep secret its connection with Forstmann, a subject about which I will say more later.

2. *Weil Gotshal did not Make a Complete and Candid Disclosure as Required by Rule 2014, Thereby Causing Actual Injury to Leslie Fay*

As I have explained, the requirements of Fed.R.Bankr.P. 2014 are more-encompassing than those governing the disinterestedness inquiry under section 327. For while retention under section 327 is only limited by interests that are "materially adverse," under Rule 2014, "all connections" that are not so remote as to be *de minimus* must be disclosed. Consequently, there is "no merit to the. . . argument that [a party] did not have to disclose its connections. . . because its attorneys did not feel that a conflict existed." *In re Rusty Jones, Inc.*, 134 B.R. 321, 345 (Bankr. N.D.Ill. 1991). Weil Gotshal had no right to "make a unilateral determination regarding the relevance of a connection." *Arlan's*, 615 F.2d at 470.

Weil Gotshal urges that it is not necessary to disclose connections to companies with which the members or the debtor's board of directors are affiliated. As a general statement, that may have some validity. But where counsel is being retained to conduct an investigation into the actions of, among others, senior management and the members of the board of directors, most assuredly connections with entities affiliated with board members that could cause pressure on investigating counsel must be disclosed. It is by the same rationale that the connection with Seidman had to be disclosed.

Not only did Weil Gotshal violate Rule 2014 by not disclosing its connections to Friedman, Tarnopol and Seidman, it also violated the rule by not disclosing its connection to Forstmann, one of the largest creditors which served for a

short while on the Creditors' Committee. Forstmann had employed Weil Gotshal as its regular counsel through 1991 and was still using Weil Gotshal on a more limited scale at the time of the April 5 filing. This was not merely a *de minimus* connection. The boilerplate language to the effect that Weil Gotshal may have in the past represented, currently represents, and may in the future represent entities which are claimants of the debtors was insufficient to alert the court to Weil Gotshal's representation of a creditor which was high on the list of the debtors' twenty largest creditors (from which list a creditors' committee is normally selected). The boilerplate is reasonable to cover inadvertent failures to disclose insignificant connections; it is not an adequate substitute for disclosure of representation of known and significant creditors. To rule any other way would be to eviscerate the disclosure requirements of Rule 2014(a). At a minimum, the order retaining Weil Gotshal should have carved out from the firm's role the responsibility for considering the *bona fides* of the Forstmann claim and Forstmann's prepetition course of dealing with Leslie Fay. By not disclosing its connection with Forstmann, Weil Gotshal caused the court to skip over an area which deserved some attention.

Weil Gotshal's nondisclosure caused Leslie Fay very real harm. The Creditors' Committee spent time and energy examining Weil Gotshal's relationships to determine if it should request some form of relief. Leslie Fay itself felt compelled to ask for the appointment of an examiner to inquire into Weil Gotshal's compliance with the law. Not only was this examination necessary, but because of Weil Gotshal's undisclosed relationships it was necessary as well for the examiner to insure that Weil Gotshal's work for the Audit Committee was free from reproach. In other words, the examiner had to investigate the investigation. This entailed duplication of much of what Weil Gotshal had already done, at considerable expense to the estate.[10] Weil Gotshal suggests that the Audit Com-

[10] It is true that the examiner found no problems with the Audit Committee's investigation and characterized Weil Gotshal's work on its

mittee's retention of Arthur Andersen was sufficient to "sanitize" the investigation without the necessity of the examiner reviewing the work product. I cannot agree. Whereas the accountants are competent and diligent, their role was to uncover what was wrong with the debtors' books and records, not to determine liability therefor. It was simply beyond their expertise to render any opinion on what claims Leslie Fay might possess arising out of the fraud, and whether it was worthwhile to pursue such claims. At further expense to the estate, the Equity Committee was required to respond to the motion for sanctions so as to protect its constituency. These are tangible costs which Weil Gotshal foisted upon the estate by virtue of its nondisclosure. Thus, we are not faced solely with upholding the integrity of the bankruptcy process, although, of course, that is an important concern as well.

The shame in all of this is that the heavy financial and emotional toll in this matter could have been avoided completely. For had Weil Gotshal revealed its connections at the time it requested court approval of its retention, an examiner could have been appointed early on to review and then complete the Audit Committee's investigation, and, if warranted, special counsel could have been thereafter appointed to institute suit. This arrangement might even have permitted Weil Gotshal's retention, albeit in a narrower role. Unfortunately, Weil Gotshal's silence prevented that from happening. I do not mean to suggest that I believe Weil Gotshal to have been venal. The examiner's report shows that not to have been so. Harvey Miller, the partner from Weil Gotshal who argued this motion, reminded me that he bad spent the last 30 years upholding the integrity of this court. I believe him to have been truthful in that statement. But that does not excuse the firm's arrogating to itself the decision as to whether it had a conflict of interest with the case in general or with the Audit Committee

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behalf as "thorough, diligent, and professional." (Ex. Report at 105). Nonetheless, because of Weil Gotshal's conflicts of interest, this could not be assumed but had to be confirmed by the examiner's lengthy investigation.

investigation in particular. Weil Gotshal was mandated to reveal any connections which might cast any doubt on the wisdom of its retention and leave for the court the determination of whether a conflict existed. It did not comply with that obligation.

D. *The Sanctions to be Granted*

The foregoing discussion brings us right back to where I began, with the troubling aspects of this motion. I have wide discretion in my selection of an appropriate remedy. *See In re Kelton Motors*, 109 B.R. at 654; *In re Iorizzo*, 35 B.R. 465, 468-69, (Bankr. E.D.N.Y. 1983); *Ionnotti*, 567 F.2d at 173. I could embrace the approach preferred by the Committees and the examiner, imposition of a monetary sanction which could be as large as the disgorgement of all fees or as small as a portion of the fees charged to the estate by the examiner and his professionals. I could also grant the motion to disqualify Weil Gotshal from further representation of the debtors and either provide or not provide for a disgorgement of fees already awarded. *See Rome v. Braunstein*, 19 F.3d at 59, n. 3 ("[C]onflict is not invariably followed by disqualification.").

As the Second Circuit noted in *Bohack*, the Circuit has been loathe in the nonbankruptcy context to separate a client from his or her chosen attorney where the alleged misconduct does not prejudice the opposing party and taint the litigation in which the attorney is appearing. Yet, the Circuit Court took pains to point out, where the choice of counsel must be approved by the court as appropriate, such that the integrity of the judicial process is implicated, the cost and delay of replacing counsel with a conflict of interest may be outweighed. 607 F.2d at 263-64. Moreover, in the bankruptcy context we are not constrained simply by the Code of Professional Responsibility but by the Bankruptcy Code itself.

There is no question but that here the facts, if disclosed, would have led to a legitimate worry that Weil Gotshal could not impartially represent the debtors in their investigation of the financial irregularities and the decisions whether and

whom to sue. Because the court was not armed with the facts, there was no meaningful opportunity provided for the court to determine whether to approve or disapprove Weil Gotshal's retention. Plainly, this implicates the integrity of the judicial process by which disinterested counsel is selected. On the other hand, by virtue of the reports prepared by the examiner, we know that Weil Gotshal actually performed the investigation competently and consistent with its fiduciary obligations to the estates. This suggests that the harm to Leslie Fay, which has been a victim first of an accounting scandal and then of a legal one, should assume some importance in the equation by which an appropriate sanction is selected.

Admittedly, in every bankruptcy case the replacement of counsel causes disruption. And to refuse to replace counsel simply because the facts become known only late into the process could perversely encourage professionals to hold back information from the court. But this is a special case, in more ways than one. Unfortunately, only ten days or so ago I reluctantly signed an order authorizing Leslie Fay to pay its debtor-in-possession lender a fee of $500,000 for a one-month amendment to the loan. This was necessitated by Leslie Fay's failure by a substantial margin to meet its projections, in violation of covenants contained in the loan. The information regarding Leslie Fay's financial performance became available only in September and Leslie Fay is now revising its projections and negotiating with the lender for an amendment to the debtor-in-possession financing agreement. Simultaneously, and as part and parcel of the interim agreement with the lender, Leslie Fay is preparing a term sheet for a plan of reorganization which it has committed to present to the Committees by January 15, 1995. Put differently, Leslie Fay is at a critical juncture in its reorganization efforts.

The cases have been here some 20 months. During that time Leslie Fay has endured the forced departure of its financial staff, which is a blow no debtor in possession would willingly suffer; a crippling strike this past summer; and now, financial results which are far from those targeted, necessitating an

expensive reevaluation of its business strategy. The financial burdens to Leslie Fay of remaining in chapter 11 are enormous. It may not be able to withstand the great delay and cost occasioned by the departure of the counsel with whom it has worked so long. It must begin the process of emerging from this court.

In an effort to reconcile the twin concerns of preserving the integrity of the bankruptcy process and the viability of the reorganization case, I have determined that I will permit Weil Gotshal to remain in the case to complete what it has begun. That is, Weil Gotshal may see the case through to reorganization and may finish those contested matters and adversary proceedings in which it is presently engaged. New counsel is to be brought in, however, to handle new matters such as litigation regarding claims, any avoidance actions and suits for relief arising out of the accounting irregularities. (To the extent that some of these matters could be handled more efficiently by counsel to one or the other of the committees, rather than special counsel to the debtors, I would consider that as well.) I reach this decision to retain Weil Gotshal for existing matters cognizant that the examiner found that: (i) nondisclosure aside, Weil Gotshal had performed the investigation properly and (ii) after exhaustive review, there were no viable claims to be asserted against senior management or Friedman and Tarnopol such that Weil Gotshal's conflict has now been eliminated. To the extent that Weil Gotshal may be called upon in a limited fashion to provide background to new counsel, I trust that it will not seek to foist this expense upon its client, an expense caused solely by Weil Gotshal's conduct.

With respect to the economic sanction which is sought by the U. S. Trustee, relief is plainly warranted there, too, both for nondisclosure and pursuant to section 328 of the Code, which permits the court to deny compensation for services and reimbursement of expenses of a professional person retained pursuant to section 327 if, at any time during that employment, the professional person is not disinterested or

holds an adverse interest to the interest of the estate with respect to the matter on which the professional person is employed. Given that I am disqualifying Weil Gotshal from handling new matters, I am limiting the economic sanction to disgorgement of the costs, direct and indirect, of both of the examiner's investigations and of the failure to disclose. This should relieve Leslie Fay of the burden imposed by its counsel. I have insufficent information to fix that number now. The costs are to include, however, not only the approximately $800,000 in fees and expenses incurred by the examiner and his professionals, but also those incurred by the Committees in dealing with Weil Gotshal's relationships and its disqualification or retention, because Leslie Fay would not otherwise have had to bear that expense. I decline to require Weil Gotshal to disgorge the fees paid it in connection with the Audit Committee investigation because that would foist upon Weil Gotshal the cost of not one, but two, investigations. One investigation would have been necessary in any event and was therefore an expense that is not related to Weil Gotshal's nondisclosure. In the event that Weil Gotshal, the Committees and the U.S. Trustee are unable to agree on the sum to be disgorged, they may schedule a further hearing to fix that number.

## CONCLUSION

The motion of the U.S. Trustee is granted in part and denied in part. SETTLE ORDER consistent with this decision.

Date: New York, New York
December 15, 1994

/s/ TINA L. BROZMAN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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93 B 41724, *et seq.* (TLB)

CHAPTER 11
(JOINTLY ADMINISTERED)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

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# NOTICE OF MOTION FOR ORDER WITHDRAWING REFERENCE WITH REGARD TO CLAIMS OF CREDITORS

PLEASE TAKE NOTICE that upon the Affidavit of Arthur M. Wisehart sworn to April 21, 1995, annexed hereto, the Memorandum of Law submitted herewith, and all prior papers and proceedings herein, Creditors Jacob V. Falbaum, Anthony E. Gill, Emile Lewkowiez, Raymond J. Terwilliger and Lee Kishbaugh will move this Court, before a Judge to be determined, on a date and time to be scheduled by the Court, in the United States Courthouse, Foley Square, New York, New York 10007, for an order pursuant to 28 U.S.C. § 157(d) withdrawing the reference with respect to the claims of creditors Jacob V. Falbaum, Anthony E. Gill, Emile Lewkowiez, Raymond J. Terwilliger and Lee Kishbaugh and granting such other and further relief on to this court may seen just and proper.

Motion Denied.
For oral opinion, see record of proceedings.

SO ORDERED

Dated: June 16, 1995

/s/ MIRIAM GOLDMAN CEDARBAUM
Miriam Goldman Cedarbaum

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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95 Civ. 2928 (MGC)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

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Before:

HON. MIRIAM GOLDMAN CEDARBAUM,
*District Judge*

APPEARANCES:

WEIL, GOTSHAL & MANGES
*Attorneys for Debtor/Respondent*

By: Brian S. Rosen

WISEHART & KOCH
*Attorneys for Claimants/Movants*

By: A.M. Wisehart

(Case called)

THE COURT: Although there doesn't seem to be any dispute about diversity here, I still have not been able to identify the citizenship of the various parties.

MR. WISEHART: There is diversity.

THE COURT: I understand, but I would like to know, since normally those allegations appear in the complaint; that is, the residence of each person and the place of incorporation and the primary place of doing business of each corporation.

MR. WISEHART: Well, this is an unusual case, your Honor. There is a motion to withdraw a reference to the bankruptcy court and its finding.

THE COURT: I understand, but while I have you, I would like to find out about my other case, too. This is not my only case. That is, you filed a claim in the bankruptcy court, Mr. Wisehart, and you also brought a lawsuit, isn't that right, in this court?

MR. WISEHART: Two lawsuits.

THE COURT: Yes.

MR. WISEHART: And the complaints in the other lawsuits are attached to our motion papers.

THE COURT: Right.

MR. WISEHART: And the basis for diversity is set forth in the complaints.

THE COURT: That is the citizenship of each party?

MR. WISEHART: Yes.

THE COURT: Where?

MR. WISEHART: Well, Exhibit F is one of the cases.

THE COURT: Yes, you allege that there is diversity of citizenship.

MR. WISEHART: Plaintiffs are residents or citizens of Pennsylvania and Florida. Defendants are—

THE COURT: I understand, but I don't know which is which.

MR. WISEHART: The plaintiffs.

THE COURT: Who is a resident of Pennsylvania and who is a resident of Florida?

MR. WISEHART: The resident of Florida is Lewkowiez. Falbaum, Gill, and Terwilliger are residents of Pennsylvania. And in the other case, Kishbaugh is a resident of Pennsylvania.

THE COURT: Thank you.

MR. WISEHART: I'm glad to be able to clear that up.

THE COURT: And Leslie Fay is a New York corporation.

MR. WISEHART: Its principal place of business is in New York.

THE COURT: Is it a Delaware corporation with its principal place of business in New York?

MR. ROSEN: I believe that's correct, your Honor.

THE COURT: All right. This is a sidelight.

MR. WISEHART: I'm glad to have an opportunity to clear that up.

MR. ROSEN: Excuse me, your Honor. Just for the reference purposes, I am here today representing Leslie Fay Company, Inc. I am not here representing the individual defendants which are the subject of the district court action. That is represented by separate counsel.

THE COURT: I understand.

MR. ROSEN: Thank you, your Honor.

THE COURT: I understand. You are here on behalf of the debtor.

MR. ROSEN: Yes, your Honor.

MR. WISEHART: Could I just supplement what I said about citizenship before. In the case of Mr. Falbaum, he was a resident and citizen of Pennsylvania. He has now moved to North Carolina. Whether that has become his citizenship now or not, I'm not clear.

THE COURT: I see. All right.

MR. WISEHART: Now, may I proceed, your Honor?

THE COURT: Yes.

MR. WISEHART: This is a motion to withdraw a reference to bankruptcy judge, and it's made under 157(d) of Title 28. Under 157(d) it's mandatory that the reference be withdrawn if the action involves a Bankruptcy Code and also a claim under a law regulating interstate commerce.

The law regulating interstate commerce that's involved is of the Age Discrimination and Employment Act, which specifically states itself to be such a law. And the proofs of claim that were filed in the bankruptcy court are made under Title 11, 507(a)(1)—

THE COURT: Well, isn't everything filed here with the bankruptcy court under Title 11?

MR. WISEHART: Yes, but I'm just saying that these claims specifically refer to Section 507(a)(1), which is an administration claim for wages or benefits from employment, so that the two requirements for a mandatory withdrawal under Section 157(d)(4) are present in this case.

THE COURT: Depending on how you interpret the statute, isn't that right? The real question is what does it mean, because—well, two things. Number one, you actually filed a claim with bankruptcy court, isn't that right? It's unusual for a claimant to seek to withdraw the reference of its own claim, since you chose to file a claim.

MR. WISEHART: No, it's done all the time, especially when there are claims for personal injuries, but when you're in the position like these claimants, who are unsure about whether or not your Honor eventually is going to rule that the individual defendants in the cases before you are liable.

THE COURT: Suable.

MR. WISEHART: Suable. The only prudent thing for them to do is to file claims in the bankruptcy court.

THE COURT: Oh, I'm not faulting them for filing claims in the bankruptcy court, but let's move on to the real issues.

The Second Circuit has held, as I understand it, that it's not enough that the laws mentioned in 157(d) be somehow related to the claim. Substantial questions about those laws have to be raised, isn't that right?

MR. WISEHART: May I address that? Because that has come up before your Honor in the initial conference we had about this last October, you may recall.

THE COURT: Yes.

MR. WISEHART: And we have the transcript as Exhibit I. One of the questions that your Honor raised at the conference was what effect is to be given to the releases that three of the

claimants, or plaintiffs, had executed. Three of them executed releases as part of a reduction in force program and two of them did not, just to summarize what the facts are.

THE COURT: Right.

MR. WISEHART: And counsel for the defendants, which are different counsel than is here appearing—and I think there is a problem about conflict of interest—but counsel for the defendants argued that would not be a fact question, and your Honor stated quite clearly that you thought whether or not the releases had been induced by fraud would give rise to dispute of fact issue; it would have to be treated as such presumably by this Court.

THE COURT: Yes.

MR. WISEHART: And then the argument before your Honor on the motion to dismiss dealt with the issue of whether the individual defendants were suable or not.

And then shortly thereafter counsel representing the individual defendants, who are members of the board of directors of Leslie Fay, got together with a litigation ally, namely counsel for Leslie Fay in the bankruptcy proceeding, and said, hey, you know, Judge Cedarbaum is going to be giving serious consideration to this question about whether the individual defendants are liable. And that argument before your Honor was on February 1st. Within two weeks, I think it was, suddenly we get this notice that objections were being filed in the bankruptcy court.

We first took the position that due deference to your Honor and in the interest of avoiding unnecessary proceedings, the objection to the claim should be deferred until your Honor had resolved the question of individual liability, because if that were resolved, it could lead to a lessening of the need to proceed against the assets under the jurisdiction of the bankruptcy court, if these individuals were personally liable.

THE COURT: Well, suppose there is a lessening. What difference does that make? Aren't you going to pursue the claim?

MR. WISEHART: Yes, but it's in the interest of the creditors. I would think that counsel for the creditors, for the debtor in

possession, would want to be our litigation ally instead of the litigation ally of the individual—

THE COURT: Forget all of that. Let me focus on the statute.

MR. WISEHART: Let me focus on this point,

because I'm getting to it. Then what came up in the bankruptcy court is what effect is going to be given to those releases that were signed.

Now, that is all a preliminary way of saying that the effect that is to be given to those releases is a matter of law that arises directly under the Age Discrimination in Employment Act. An amendment to the Age Discrimination in Employment Act was the Older Workers Benefit Protection Act, which was signed in the law in October 16th, 1990.

THE COURT: What does that have to do with the releases?

MR. WISEHART: The Older Workers Benefit Protection Act specifies very detailed provisions about when and under what circumstances releases of this kind can be given effect, and it states that they must be voluntary and they cannot be considered knowing and voluntary unless at a minimum—and then there are a number of provisions that look like the Internal Revenue Code. You have to set forth the identification of the other employees in the group who were affected by the reduction in force program. You have to set down the specific circumstances under which the releases were obtained. There has to be a 45-day waiting period. There has to be compliance with these requirements.

And furthermore, unlike the general law on what is fraudulent release, the Older Workers Benefit Protection Act specifies that the burden of proof is on the opposite side. The other side has to show whether or not the releases were executed on a voluntary and knowing basis.

So the reason I'm saying this is because the intersection of the statutory provisions here is not something that is just a general reference but has to do with specifically the way this has developed into what would necessitate a consideration of something that is not within the normal type of proceeding that's conducted by a bankruptcy court but, instead, is within the type of proceeding that would come up before a district

court in an action under the Age Discrimination in Employment Act.

Now, I didn't spell out in our papers in detail what the provisions of the Older Workers Benefit Protection Act are. I do have a summary memorandum that was prepared for the American Newspaper Publisher's Association by an attorney I know who spells them out. This was shortly after the law was enacted. And I will be glad to send a copy down to the Court simply to—

THE COURT: Well, I have no problem examining the statute.

MR. WISEHART: Okay. So, anyway, you will see when you examine the statute how detailed these provisions are. And I think it's clear that, as a matter of not only judicial efficiency and economy, but in terms of judicial expertise, this is not the kind of thing that is within the proper scope of the bankruptcy proceeding.

Now, I have one other thing I would like to add, and that is that this morning I brought in a copy of a United States Supreme Court decision that your Honor may think has some relevance. It's on the question of whether or not a settlement proceeds from an Age Discrimination in Employment Act.

THE COURT: Are taxable.

MR. WISEHART: Are taxable, right.

THE COURT: Yes.

MR. WISEHART: And it says that they are taxable. I guess your Honor probably saw this in the paper.

THE COURT: Yes.

MR. WISEHART: Justice Stevens ran an opinion, Justice O'Connor assenting and two other judges, on the ground that the benefits under the Age Discrimination in Employment Act are like wages or salary, which we think reinforce our position that it's like having wage claims. But the question of what is going to be given the effect under the releases is governed by the Age Discrimination in Employment Act, and it's really not properly before the bankruptcy court. Now, shall I give you a copy of this decision?

THE COURT: It's not necessary. Thank you, thank you. They held that it was compensatory.

MR. WISEHART: Yes.

THE COURT: And therefore, taxable.

MR. WISEHART: I wanted to bring it out. I got it hot off the press when I went into the office this morning.

THE COURT: Thank you, Mr. Wisehart. Let me hear from your adversary.

MR. WISEHART: Let me say one other thing as a footnote to what I just said.

There are also claims under the state discrimination laws, New York and Pennsylvania, that are asserted as part of the claims. Now, the law is somewhat different under New York and Pennsylvania. Those are not pure wage compensation discrimination laws. They allow for compensatory damages more like what you recover for personal injury torts.

THE COURT: All right, I understand your point. Why don't you proceed.

MR. ROSEN: Thank you, your Honor.

Your Honor, first, it is very uncommon for someone who files a proof of claim in a bankruptcy case to attempt to seek to withdraw the reference with respect to that claim. And here it's a very interesting situation where the proofs of claim were filed in the bankruptcy court and then subsequently litigation was commenced in this court with respect to the individual officers and directors.

Your Honor, with respect to mandatory versus permissive withdrawal, if I could quote for your Honor in Laventhal and Horwath, which was a decision in 1992 out of the Southern District of New York, the Court stated, "Where a proceeding will involve only a straightforward application of a federal statute to a particular set of facts, rather than issues requiring significant interpretation of federal laws that the Congress would have intended to have decided by a district judge rather than a bankruptcy judge, withdrawal is not mandatory."

Your Honor, the bankruptcy court, in its decision with respect to the cross-motion filed by Mr. Wisehart on behalf of his clients, cited cases emanating out of the Southern District of New York and the Second Circuit, your Honor, which

detailed the determination of a proof of claim is the daily risk of what a bankruptcy court is obligated to do.

What we have before the Court today, your Honor, and before the bankruptcy court is the fact that five people filed proofs of claim. Leslie Pay filed objections to three of them at the outset an the basis of executions of releases. Now we seek to go forward with those because those claims are approximately $40 million worth of claims against the estate. They are inhibiting the promulgation of the plan of the organization and the promulgation of the plan of reorganization. It is the debtor's intent, based upon the work that is undertaken with the creditor's committee, to have a disclosure statement with respect to that plan approved sometime in August, your Honor. We hope to be out of Chapter 11 by the end of the third quarter, the beginning of the fourth quarter. Obviously, therefore, your_Honor, resolution of the sizable claims is necessary in order for the bankruptcy court to make that determination.

Leslie Fay has been determined not to be a necessary or indispensable party here in the district court. thus, it was not brought into that district court action. All Leslie Fay is seeking to do is to have claims determined against it in the bankruptcy court, the Place where these claimants filed their proofs of claim, your Honor.

Even if this Court were to determine that withdrawal of the reference was appropriate, these claimants Still would not be entitled to a jury trial in this court with respect to claims against Leslie Fay. This Court would be sitting as a Court of equity. And these claimants have waived a right to jury trial based upon Supreme Court and Second Circuit law, your Honor. Under any of the permissive withdrawal guidelines, these claimants do not satisfy any of the requirements.

As the bankruptcy court painstakingly went through in its bench decision, which is annexed to our objection, Your Honor, each of the issues that have been raised by the claimants were flatly rejected. There would be no lessening of claims against the bankruptcy estate if there was liability against the individual officers and directors up here because there is indemnification claims that these officers and direc-

tors would have back against Leslie Fay. There is no savings of judicial resources because this Court would have to have a hearing with respect to Leslie Fay and, likewise, have the hearing against individual officers and directors.

The bankruptcy court is moving expeditiously with this, your Honor. There has been discovery going on in the bankruptcy court based upon a status conference that was held between all parties. Depositions are to conclude near the end of July. The bankruptcy court has set up this matter for a motion for summary judgment on the issue of the releases. If the court denies the motion for summary judgment, your Honor, the court is prepared to have a trial on the merits with respect to all claims against these people and have it expeditiously determined by the end of the summer, the beginning of the fall, your Honor. This is something that is required to move this Chapter 11 case forward, your Honor. These claimants have knowingly and willingly waived their right to a jury trial as set forth in the ADEA statute, your Honor. Notwithstanding Mr. Wisehart's citation, there can't be anything more specific, more knowing, more willing than the filing of a proof of claim, your Honor.

We suggest that their motion should be denied in its entirety and that the bankruptcy court should continue with its determination of all of the claims.

Thank you.

THE COURT: There is no question that a proof of claim—that is a claim by a creditor against the debtor is a core proceeding. It is traditionally what bankruptcy courts have always decided and what Congress intended them to continue to decide after Marathon Pipe Line, which led to the amendments of the bankruptcy law to change the previous law with respect to claims not against the debtor, but claims against third parties that were brought in the bankruptcy court.

As I have studied the decisions under Section 157(d), withdrawal is mandatory only if it requires both the construction and interpretation of two different statutes, Title 11 and a federal statute.

Apart from the fact that all Proofs of claim are brought in bankruptcy, this particular proof of claim does not require

construction of the Bankruptcy Act, Title 11, and I am not clear that there is anything more than a straightforward application of a federal statute even as to the age discrimination statute because the release discussion that you have quoted me on, Mr. Wisehart, had to with whether there were factual issues here, not legal issues. The detailed statute that you have drawn to my attention is quite clear. These releases have to be placed alongside of that statute. That does not require significant construction of the statute.

As I understand it, there is no serious issue of statutory construction of either Title 11 or the ADEA, but, in any event, there is not serious construction of both involved here which would mandate withdrawal, so that I turn, then, to whether permissive withdrawal, which is authorized by Section 157(d) for cause shown, should be granted here.

In the case of In re: Orion Pictures Corporation, which is at 4 F.3d 1095, the Second Circuit recently decided that, in determining whether to withdraw the reference, it is particularly important to determine first whether the proceeding is a core or a non-core proceeding because the questions of uniformity and efficiency as well as issues of jury trial are not as important in core as in noncore matters, and that is because the district court reviews non-core matters de novo in any event, whereas core proceedings are reviewed as appeals and with the more limited jurisdictional review.

Another matter that might influence permissive withdrawal is whether the plaintiff is entitled to a jury trial. And in this case, if the other case proceeds against the individuals, a jury trial is permitted, whereas, with respect to this claim, the plaintiff has waived a Jury

Because this is a traditional core proof of claim in bankruptcy, which historically is an equitable claim in that bankruptcy courts have been courts of equity historically, it is clear that the allowance or disallowance of claims against the estate are core matters. They are the traditional claims that bankruptcy courts have always resolved, and that is why they are described as core proceedings in the amendments to the bankruptcy law that followed Marathon Pipe Line.

A state civil rights claim has been held by another judge of this district not to be either a personal injury tort or sufficiently analogous to a personal injury tort within the meaning of Section 157(b)(2)(B), and that decision appears at 107 Bankruptcy Reporter 453 and was decided in 1989 by Judge Brieant of this district.

It may be arguable that if the suit against the individuals goes forward, there might be some efficiency in combining these two trials, but not if it's going to delay the hearing of this one. It is also true that it is not at all clear yet that the other case will go forward, and judicial efficiency and economy is always served by proceedings moving forward as expeditiously as possible.

So that, on balance, since claimants have not shown that either mandatory or permissive withdrawal is I justified in this case or that mandatory withdrawal even applies here, I deny the motion to withdraw the reference.

Now, if I should decide before this proof of claim is actually heard that the individual defendants can be sued, I would entertain a motion to reconsider this matter, but that is with respect to permissive withdrawal. I am satisfied that there is no basis for mandatory withdrawal here, and I, therefore, deny the motion.

MR. ROSEN: Thank you, your Honor.

Your Honor, may we so order the transcript, or would you like us to submit a separate brief?

THE COURT: Oh, I will endorse the papers "Motion denied. See record of proceedings."

MR. ROSEN: Thank you very much, your Honor.

THE COURT: Very well.

MR. ROSEN: Have a good day.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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95 Civil 2928 (MGC)
93 B 41724, *et seq.* (TLB)

CHAPTER 11
(JOINTLY ADMINISTERED)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

---

# JUDGMENT

Creditors Jacob V. Falbaum, Anthony E. Gill, Emile Lewkowiez, Raymond J. Terwilliger and Lee Kishbaugh having moved for an order pursuant to 28 U.S.C. Sec. 157(d) withdrawing the reference with respect to the claims of the above mentioned creditors and granting such other and further relief as the Court may seem just and proper, and the said motion having come before the Honorable Miriam Goldman Cedarbaum, U.S.D.J., and the Court thereafter an June 16, 1995, having handed down its memorandum endorsement, denying the said motion, it is hereby,

ORDERED, ADJUDGED AND DECREED: That the creditors' motion is denied.

Dated: New York, New York
June 16, 1995

/s/ JAMES M. PARKINSON
James M. Parkinson
Clerk of Court

By: /s/ JOHN S. HAGEN
John S. Hagen
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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95 Civil 2928 (MGC)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

---

NOTICE OF MOTION TO
ALTER OR AMEND AN ORDER

PLEASE TAKE NOTICE THAT, upon the annexed affidavit of Arthur M. Wisehart sworn to August 4, 1995, and the accompanying Memorandum of Law, creditor-claimants will move this Court at the United States Courthouse, 500 Pearl Street, New York, New York, Courtroom 14A, at 9:30 a.m. on August 25, 1995, or as soon thereafter as counsel may be heard, for an Order pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure, altering or amending the provisions in the Order dated June 16, 1995, regarding permissive withdrawal of the reference of creditor-claimants' claims to the Bankruptcy Court.

PLEASE TAKE FURTHER NOTICE that, pursuant to Local Civil Rule 3(c)(2), answering papers are to be served by hand deliver counsel for creditor-claimants on or before August 18, 1995.

Dated: New York, New York
August 4, 1995

/s/ ARTHUR M. WISEHART
Arthur M. Wisehart (AMW 4003)

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19 W 44th Street
Suite 412
New York, New York 10036
(212) 730-0044

*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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95 Civil 2928 (MGC)

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In re

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Debtors.*

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AFFIDAVIT IN SUPPORT OF
MOTION TO ALTER OR AMEND

ARTHUR M. WISEHART, being duly sworn, deposes and states:

1. I am a member of the Bar of this Court and of the firm of WISEHART & KOCH, attorneys for five former employees of the Debtors ("Leslie Fay") who are creditor-claimants herein.

2. This affidavit is respectfully submitted in support of the request of those creditor-claimants, Jacob V. Falbaum, Anthony Gill, Emile Lewkoviez, Raymond J. Terwilliger and Lee Kishbaugh, to alter or amend this Court's Judgment dated June 22, 1995, incorporating the memorandum endorsement dated June 16, 1995, which denied the former employees' motion to withdraw the reference of their claims from the Bankruptcy Court.

3. At the hearing on June 16, 1995, the notion to withdraw the reference was denied with the following proviso (Exhibit A annexed hereto, p. 19):

> "Now, if I should decide before this proof of claim is actually heard that the individual defendants can be sued, I would entertain a notion to reconsider this matter, but that is with respect to permissive withdrawal."

4. Following this Court's decision of June 16, 1995, his Court issued a Memorandum opinion and Order dated July 24, 1995 which denied defendants' motion to dismiss the complaints with respect to plaintiffs' claims under the New York City Civil Rights Law. The decision also dismissed plaintiffs' claims under federal and state civil rights laws. (Exhibit B.)

5. Because of this Court's decision of July 24, actions entitled *Falbaum, et al. v. Pomerantz, et al.*, 94 Civ. 5503 (MGC), and *Kishbaugh v. Pomerantz, et al.*, 94 Civ. 7921 (MGC), proceeding against the individual defendants, who were senior executives in control of Leslie Fay.

6. This Court's Opinion of June 16, indicates that motion to withdraw the reference may be appropriate in the present circumstances. The Opinion states (Exhibit A, p. is):

> "It may be arguable that if the suit against the individuals goes forward, there might be some efficiency in combining these two trials, but not if it's going to delay the hearing of this one. It is also true that it is not at all clear yet that the other case will go forward, and judicial efficiency and economy is always served by proceedings moving forward as expeditiously as possible."

7. Permissive withdrawal of the reference is required by law and also is in the interest of justice.

8. Unless the reference is withdrawn, there will be duplicative proceedings in the District Court and in the Bankruptcy Court. Both of the proceedings will be addressing the same issues: proof of discrimination and the validity of the purported releases signed by four of the five claimants, Jacob Falbaum, Anthony Gill, Raymond Terwilliger and Lee Kishbaugh. No purported release was given by Emile Lewkowiez.

9. It is the stated intention of the Debtor to proceed with a notion for summary judgment in the Bankruptcy Court based on the theory that the four releases bar any claim.

10. However, such a position was also asserted by the same attorney, Joel Cohen, Esq., in this proceeding and this Court ruled that such a motion has no validity as it raises an issue of disputed fact to be tried before the jury.

11. In the hearing on October 31, 1994, Judge Cedarbaum stated that the effectiveness of the releases and the liability of the individual defendants could not be resolved without a jury trial (TR 21-22):

> "THE COURT: I think I need authority on that."
>
> "MR. COHEN: Yes, because the effectiveness of the releases is not under the ADEA your Honor, it is not an ADEA action."
>
> "THE COURT: It has nothing to do with that. That has nothing to do with it. If you are asserting an affirmative defense of release to a suit under ADEA, as I read the rules, I can separate out any distinctive issue that might dispose of the case more efficiently, designate it as a separate, distinct issue, and try it promptly. *But the trial must be before the same finder of fact. That is, you are offering release as a defense, an affirmative defense to an ADEA claim.*"
>
> "MR. COHEN: Yes."
>
> "THE COURT: If this were a nonjury case, it would be very easy. I do statute of limitations that way all the time when there is a factual issue, and it is a very efficient way of determining a threshold issue. If there really are issues of fact here, that is not such an efficient way. I would need to use a jury. That gets to be more complicated."
>
> "MR. COHEN: Your Honor, if I may suggest, we could make an omnibus motion to dismiss based on individuals and based on the releases."

"THE COURT: *You can't do it based on the releases because we are going to have factual issues asserted immediately*. In any event, it is clear to me that what is going to have to happen is that you are going to have to move first on the individuals, which is a clean, clear, separate issue of pure law. I am not at all sure that separating out the release is going to be, although I will cross that bridge when I get to it. I find, generally speaking, unless something is clearly dispositive as an issue of law, in the long term we don't save a lot of time and money postponing discovery." (Emphasis added.)

12. Moreover, the availability of a jury trial against or the individual defendants is an important factor in favor of permissive withdrawal, as stated in this Court's opinion of June 16, 1995, which states (Exhibit A p. 17):

"Another matter that might influence permissive withdrawal is whether the plaintiff is entitled to a jury trial. And in this case if the other case proceeds against the individuals, a Jury trial is permitted, whereas, with respect to this (bankruptcy] claim, the plaintiff has waived a jury."

13. The withdrawal of the reference would avoid conflicting determinations and result in the conservation of Judicial resources by avoiding the necessity of two separate trials, one of which is a jury trial in this Court.

14. As pleaded in the Amended Complaint in *Falbaum* ¶¶ 38-46, 60-63, and in *Kishbaugh*, ¶¶ 28-30, 37-41, 59-61, such, releases are without force and effect as having been obtained on the basis of fraud and coercion, under false pretenses, and in furtherance of unlawful discriminatory acts. See *Joint Venture Asset Acquisition v. Zellner*, 808 F. Supp. 289, 302 (S.D.N.Y. 1992).

15. Moreover, since the individual defendants are subject to individual liability as a result of this Court's decision of July 24, 1995, which would make additional sources of assets available beyond the limited assets of the Debtor for the satisfaction of such claims.

16. It therefore is in the interest of justice that these cases be litigated at the same time and in the same Court which can provide relief as against all entities including those that are subject to liability an the claims.

17. Withdrawal of the reference to the Bankruptcy Court therefore is both required as a matter of law and desirable in the interest of justice, and it is respectfully requested that this Court amend its Order of June 16, 1995 accordingly.

Respectfully submitted,

/s/ ARTHUR M. WISEHART
Arthur M. Wisehart

(3)

No. 99-548

Supreme Court, U.S.
FILED
NOV 29 1999
OFFICE OF THE CLERK

In the

# Supreme Court of the United States

IN RE: THE LESLIE FAY COMPANIES, INC.,

*Debtors.*

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD, and RAYMOND J. TERWILLIGER,

*Petitioners,*

vs.

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## COUNTER STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

**1.** Have petitioners satisfied Supreme Court R. 10 and presented any basis for this Court to grant certiorari to review the merits of the decision below?

## RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent The Leslie Fay Companies, Inc. states that it does not have any subsidiaries in which it holds less than a 100% ownership interest and that have issued shares to the public.

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No. 99-548

In the

# Supreme Court of the United States

IN RE: THE LESLIE FAY COMPANIES, INC.,

*Debtors.*

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD, and RAYMOND J. TERWILLIGER,

*Petitioners,*

vs.

THE LESLIE FAY COMPANIES, INC., *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

The Leslie Fay Companies, Inc., *et al.* (collectively "Leslie Fay"), Weil Gotshal and Manges ("WG&M"), McDermott, Will & Emery ("MW&E") and Parker Chapin Flattau & Klimpl ("Parker Chapin") respectfully submit this brief in opposition to the petition for a writ of certiorari by Jacob V. Falbaum ("Falbaum"), Anthony Gill ("Gill"), Emile Lewkowiez ("Lewkowiez"), Lee L. Kishbaugh ("Kishbaugh"), Raymond J. Terwilliger ("Terwilliger") and Elizabeth Michaud ("Michaud") (collectively "Petitioners").

## Counter-Statement of the Case

This petition for certiorari arises out of the affirmance by the United States Court of Appeals for the Second Circuit ("Court of Appeals") and the United States District Court for the Southern District of New York ("District Court") of the decisions of the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") to: (i) disallow all of Petitioners' $80 million administrative expense priority age, sex and disability discrimination claims; and (ii) award approximately $12 million in fees plus expenses to the three law firms that served as Debtors' Counsel for their services on behalf of Leslie Fay during a period of nearly four-and-one-half years.

Although presented as a petition for certiorari, Petitioners' brief does not even attempt to satisfy the requirements of Supreme Court R. 10. Instead, Petitioners treat this Court as if its function were to provide yet a third level of appellate review of the merits of the Bankruptcy Court's decisions. As will be shown below, Petitioners simply have not, and cannot, fulfill their obligation of demonstrating a basis for this Court to grant certiorari. Accordingly, their petition should be denied.

## Statement of Facts

On April 5, 1993, about two months after the discovery and announcement of accounting irregularities in certain of its Securities and Exchange Commission filings, Leslie Fay and three of its affiliates filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.* (the "Bankruptcy Code") with the Bankruptcy Court. Thereafter, Leslie Fay continued to operate and manage its business as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy

Code. (A 3842). The Fourth Amended and Restated Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code, that was proposed jointly by Leslie Fay and its Official Committee of Unsecured Creditors (the "Plan"), was confirmed by order of the Bankruptcy Court entered on April 21, 1997. (A 3746-3779). The effective date of Leslie Fay's confirmed Plan was June 4, 1997.

Petitioners are former employees of Leslie Fay. Falbaum and Lewkowiez were terminated pursuant to a reduction in force ("RIF") in August 1992, about eight months before the Chapter 11 filing. Terwilliger's employment was terminated separately in August 1992. Gill's employment was terminated in March 1992. Kishbaugh was terminated pursuant to a RIF in November 1993. Michaud voluntarily retired on December 31, 1992.

**The Releases**

Leslie Fay company policy prohibits the payment of severance benefits to an involuntarily terminated employee unless that employee executes a release waiving any and all claims he or she may have against the company up to the date of the release. In accordance with this policy, Leslie Fay offered Falbaum, Gill, Terwilliger, Kishbaugh and Lewkowiez the opportunity to obtain severance benefits in consideration for the execution of a release. Michaud voluntarily retired, so she was not asked to sign a release and was not entitled to or offered severance. Falbaum, Gill, Terwilliger and Kishbaugh each executed a release at or after their terminations and received severance payments.[1] Lewkowiez declined to sign a release, so he did not receive any severance.

---

[1] The claims released included those later asserted by Petitioners in these cases.

Despite their releases, on June 1, 1993, shortly after Leslie Fay filed its bankruptcy petition, Falbaum, Gill and Terwilliger, joined by Lewkowiez and Michaud, filed with the Bankruptcy Court proofs of claim against Leslie Fay. Kishbaugh's proof of claim was filed on August 3, 1994, following his November 1993 termination. Falbaum, Gill, Terwilliger, Kishbaugh and Lewkowiez alleged that their employment with Leslie Fay had been terminated (and that they subsequently were not rehired) due to age, in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, *et seq.* (1998) (the "ADEA"), the New York State Human Rights Law, N.Y. Exec. Law §§ 290, *et seq.* (McKinney 1993) (the "NYSHRL"), and the Pennsylvania Human Relations Act, 43 Pa. Stat. Ann. §§ 951, *et seq.* (1996) (the "PHRA"). Michaud alleged that she had been constructively terminated, discriminated and/or retaliated against due to her gender and disability in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C §§ 2000e, *et seq.* (1994 and Supp. 1998) ("Title VII"), the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §§ 12101, *et seq.* (1995 and Supp. 1999) (the "ADA"), the NYSHRL and the PHRA. Collectively, Petitioners sought $80 million of damages in respect of these claims. Petitioners proofs of claim did not, however, demand a jury trial.

Leslie Fay objected to Petitioners' claims on the merits and on the ground that certain of the claims were barred by the releases those Petitioners had signed. Thereafter, on several occasions Petitioners moved the District Court for an order pursuant to 28 U.S.C. §157(d) withdrawing the reference of their claims from the Bankruptcy Court, urging, among other things, that mandatory withdrawal of the reference was required because resolution of their claims would require consideration of both title 11 and the ADEA, and permissive withdrawal was appropriate in order to preserve their jury trial rights. The District Court denied each of these motions.

## Petitioners' Objections to Debtors' Counsel's Fee Applications

In June 1997, all of the professional firms that had provided services in connection with Leslie Fay's bankruptcy case applied to the Bankruptcy Court for a final award of fees and expenses.[2] Although Petitioners had not objected to the previous twelve sets of interim fee awards made during the four years that Leslie Fay's bankruptcy case was pending, Petitioners objected to the final fee applications filed by WGM, Leslie Fay's general bankruptcy counsel, MW&E, Leslie Fay's special labor counsel, and Parker Chapin, Leslie Fay's special corporate counsel (collectively "Debtors' Counsel"). Petitioners claimed that Debtors' Counsel each suffered from impermissible conflicts of interest and thus all of the fees previously awarded to them should be disgorged.[3] At a hearing on July 31, 1997, the Bankruptcy Court overruled all of Petitioners' objections and granted the final fee applications of all Debtors' Counsel. 18a.

## The Decision on the Merits

The Bankruptcy Court issued its Decision After Trial on Employees' Discrimination Claims (the "Merits Decision") on August 18, 1997 and held that: (i) although Petitioners demonstrated a *prima facie* case of discrimination, they failed to meet their ultimate burden of proving that

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[2] In bankruptcy cases, professionals employed by or on behalf of a debtor's estate must apply to the Bankruptcy Court for approval of their compensation. *See* 11 U.S.C. §330(a).

[3] The Bankruptcy Courts are permitted to make interim fee awards to professionals during a bankruptcy case pursuant to 11 U.S.C. §331. However, all interim awards are subject to reconsideration at the time of the final fee application. *See, e.g., Matter of Evangeline Refining Co.*, 890 F.2d 1312 (5th Cir. 1989).

discriminatory animus was the underlying reason they were terminated or not rehired or not promoted; (ii) Leslie Fay had met its burden of producing legitimate, non-discriminatory reasons for each of the challenged adverse employment actions; and (iii) as a result, Petitioners were not entitled to any recovery on their claims. 31a-119a. The Bankruptcy Court also reiterated its earlier holding that petitioners lost their rights to a jury trial of their claims when they filed proofs of claims. 72a. The Bankruptcy Court further held that petitioners had failed to assert that their claims were personal injury torts within the meaning of 11 U.S.C. §157(b)(2)(B) and thus had waived any right to withdrawal of the reference based on that argument. 73a-75a.

In its findings of fact, the Bankruptcy Court credited the testimony of witnesses called by Leslie Fay with respect to the absence of any discriminatory intent. 39a-40a. The Bankruptcy Court's findings also were supported by admissions made by petitioners and their spouses. 40a-41a; 50a; 53a; 101a-102a. In contrast, the Bankruptcy Court found that Terwilliger, the "chief witness for the Petitioners attesting to the age-biased animus driving the layoffs in Pennsylvania", was not credible. 38a; 40a.

**The Appeals**

Petitioners appealed from the Merits Decision and the Bankruptcy Court's fee awards to the District Court and the Court of Appeals. Each of these courts reviewed the Bankruptcy Court's findings of fact on the clearly erroneous standard and its conclusions of law *de novo*. *See Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.)*, 68 F.3d 26, 29 (2d Cir. 1995). Additionally, the courts reviewed the Bankruptcy Court's grant or denial of fees to Debtors' Counsel, based upon an alleged lack of disinterestedness or adverse interest under 11 U.S.C. § 328(c), under the abuse of discretion standard. *See Electro-Wire Prods. v. Sirote &*

*Permutt, P.C., (In re Prince)*, 40 F.3d 356, 359-60 (11th Cir. 1994); *Gray v. English*, 30 F.3d 319, 324 (10th Cir. 1994).

Both the District Court and the Court of Appeals affirmed the Bankruptcy Court's decisions in all material respects. The Court of Appeals specifically rejected Petitioners' claim that the Bankruptcy Court did not have jurisdiction to try their claims without a jury:

> It is, however, well settled law that the determinative factor as to a bankruptcy court's jurisdiction is that the objecting party filed a proof of claim resulting in an adversary proceeding that involved the allowance or disallowance of claims against the estate. By filing a proof of claim, a creditor also forsakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim. Because the creditors in this case filed proofs of claim with the bankruptcy court seeking direct allowances against the debtor's estate, the bankruptcy court had the jurisdiction to adjudicate these claims without a jury.

2a-3a (internal citations omitted). The Court of Appeals also rejected Petitioners' claim that withdrawal of the reference was mandated by 28 U.S.C. §157(d):

> Nor are we persuaded that mandatory withdrawal was appropriate under 28 U.S.C. § 157(d), which is reserved for cases requiring significant interpretation, as opposed to simple application of federal laws apart from the bankruptcy statutes. . . . Only one of the creditors' claims even arguably required the significant interpretation of non-Bankruptcy Code federal statutes. In particular, the bankruptcy court was required to decide a then-unsettled issue when adjudicating Kishbaugh's claims as to whether releases that were otherwise unenforceable could be

> ratified by the releasor's failure to tender back the consideration give for the release. The creditors never explicitly pointed out the difficulty of the issue, however, in its motions to withdraw or as a ground for withdrawal. Any error involved in adjudicating it was, moreover, harmless because the issue was decided in Kishbaugh's favor.

3a (internal citations omitted). Finally, the Court of Appeals held that Petitioners' evidentiary challenges were unfounded, and their allegations of attorney conflict were either "conclusory, unappealable or fail to allege an actual conflict." 4a (internal citations omitted).

## Argument

### THERE IS NO REASON TO GRANT CERTIORARI HERE

Long ago, this Court, by its then Chief Justice, William Howard Taft, held that "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). *See also Braxton v. U.S.*, 500 U.S. 344, 347 (1991) ("a principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law").

What was true then is true today. "Despite the broad sweep of its powers, the Supreme Court has long since lost the capacity to function as a final source of general appellate jurisdiction. It cannot possibly hear all litigants . . . [but rather] must husband its scarce adjudicatory resources for the most fundamental constitutional and statutory questions. . . " Wright, Miller & Cooper, *Federal Practice and Procedure*: Jurisdiction 2d § 4001 at 4 (West 2d ed. 1996).

In hearings before the House Committee on the Judiciary, Chief Justice Taft also explained that "no litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose." He further stated that:

> When a case goes beyond [the courts of appeal], it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing principles of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.

Hearings before the House Committee on the Judiciary, 67th Cong., 2d Sess., ser. 33 at 2 (1922).

For this reason, Supreme Court R. 10 specifically provides that "review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. . . A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." The Rule sets out the following bases for which this Court grants a petition for a writ of certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10 (a)-(c).

Petitioners have failed to present this Court with any legal issues that satisfy the requirements of Rule 10. Instead, petitioners seek an unjustified third level of general appellate review of findings of fact and conclusions of law that were twice affirmed in all material respects by the Court of Appeals and District Court. For the reasons outlined above, this Court should not allocate its scarce and valuable time to review ordinary litigation disputes of this type. For this and all of the reasons discussed below, the Court should deny the petition.

### A. The Bankruptcy Court's Jurisdiction to Adjudicate Petitioners' Proofs of Claim Does Not Present an Unsettled Question of Law

Petitioners first argue that this Court should grant certiorari to determine the allegedly unsettled question of whether filing proofs of claim against Leslie Fay's estate subjected them to the equitable jurisdiction of the Bankruptcy Court and caused them to lose their right to a jury trial on those claims.[4] *See* Pet. Br. at 8-14. According to Petitioners, this is an "important issue. . . that warrants resolution." *Id.* at 7.

However, this issue has been resolved by controlling decisions of this Court. This Court repeatedly has held that a creditor who voluntarily agrees to participate in the equitable reordering of a debtor's estate by filing a proof of claim has no jury trial rights with respect to proceedings relating to the "allowance or disallowance" of those claims.[5] *See*

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[4] Petitioners also assert, without citing any authority, that the Bankruptcy Court's equity jurisdiction cannot preempt jury trial rights guaranteed by a federal discrimination statute. Pet. Br. at 10-11. However, petitioners' claims are no different from those of any other creditor who seek to recover damages against a debtor based on a common law or statutory cause of action that would carry with it a right to a jury trial if asserted outside of the bankruptcy context. And, as this Court held in *Katchen v. Landy*, 382 U.S. 323 (1966), the need for orderly administration of bankruptcy estates presents exactly the type of circumstance in which a court of equity is authorized to resolve issues that otherwise would be determined by a jury in a legal action. *See Katchen*, 382 U.S. at 339-340. *See also First Fidelity Bank, N.A., New Jersey v. Hooker Investments, Inc. (In re Hooker Investments, Inc.)*, 937 F.2d 833, 839 (2d Cir. 1991) (same). For this reason, Petitioners' reliance on this Court's decision in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990), a case that did not involve claims presented in the Bankruptcy Court, is inapposite.

[5] The only exception to this rule are personal injury and wrongful death claims that are required to be heard in the District Court pursuant to 28 U.S.C. §§ 157(b)(2)(B) and (b)(5).

*Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 58 (1989) (a creditor's right to a jury trial on a claim depends upon whether the creditor has submitted a claim in the bankruptcy court, thereby submitting to the equitable jurisdiction of the bankruptcy court); *Langenkamp v. Culp*, 498 U.S. 42 (1990) (creditor who filed proof of claim had no right to jury trial of bankruptcy trustee's preference action against that creditor, because preference action was equitable part of the claims allowance/disallowance process), *reh'g denied*, 498 U.S. 1043 (1991); *Katchen v. Landy*, 382 U.S. 323, 336-37 (1966) (no Seventh Amendment right to a jury trial for determination of objections to allowance and disallowance of proofs of claims). Like the *Langenkamp* creditors, once Petitioners filed their proofs of claim they triggered the Bankruptcy Court's equitable jurisdiction and lost any right to a jury trial of those claims.[6]

Petitioners attempt to distinguish *Germain v. Connecticut Nat'l Bank*, 988 F.2d 1323 (2d Cir. 1993), the case relied on by the Court of Appeals in its decision below, on its facts. In doing so, Petitioners ignore the central holding of that case and of this Court's decisions in *Granfinanciera*, *Langenkamp* and *Katchen*, which were specifically cited therein:

> An action that bears on the allowance of a claim is *integrally related to the equitable reordering* of debtor-creditor and creditor-creditor relations. If an

---

[6] Petitioners claim that they did not "voluntarily" agree to participate in the claims allowance process because they were forced to file proofs of claim by the Bankruptcy Court's bar order and the law of ADEA, or they would have waived their right to recover against Leslie Fay. Pet. Br. at 11-13. Whether or not petitioners "voluntarily" filed their proofs of claim does not change the fact that by doing so, petitioners invoked the equity jurisdiction of the Bankruptcy Court and thereby lost their right to a jury trial of those claims. Indeed, no other conclusion would makes sense: no creditor "voluntarily" files a proof of claim but rather does so in order to participate in the equitable reordering of the debtor's estate.

> equitable reordering cannot be accomplished without resolution of what would otherwise be a legal dispute, then that dispute becomes an essential element of the broader equitable controversy. . . . [T]he Katchen, Granfinanciera, and Langenkamp line of Supreme Court cases stands for the proposition that *by filing a proof of claim a creditor forsakes its right to adjudicate before a jury any issue that bears directly on the allowance of that claim* — and does so not so much on a theory of waiver as on the theory that the legal issue has been converted to an issue of equity. It is reasonable that a creditor or debtor who submits to the equity jurisdiction of the bankruptcy court thereby waives any right to a jury trial for the resolution of disputes vital to the bankruptcy process, such as those involving the determination of who is a valid creditor. . .

*Id.* at 1329 (emphasis added).

Here, no preference or other action against Petitioners by the debtor was filed. Rather, the Bankruptcy Court simply adjudicated Leslie Fay's objections to Petitioners' claims -- the very "claims allowance and disallowance" process that the Court has held falls squarely within the Bankruptcy Court's equity jurisdiction and as to which no Seventh Amendment jury trial right attaches. Petitioners also have not demonstrated that a split exists among the United States courts of appeals in their application of this rule; nor have petitioners even attempted to demonstrate the existence of a single decision by any Court of Appeals or state court that conflicts with this Court's decisions. Under these circumstances, petitioners have not established a basis for this Court to grant certiorari.

### B. Application of 28 U.S.C. § 157(d) to Petitioners' Claims Is Not A Disputed Issue of Law Requiring this Court's Review

Petitioners also argue that this Court should grant certiorari to determine if withdrawal of the reference of their discrimination claims was mandated by 28 U.S.C. §157(d). According to petitioners, Section 157(d) and this Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) prohibit Bankruptcy Courts from trying any claim that requires consideration of both Title 11 and other laws affecting interstate commerce, and argue that the application of Section 157(d) to discrimination claims is a matter of "first impression." *See* Pet. Br. at 14. However, *Northern Pipeline* dealt with a state law claim asserted by a debtor against a third party rather than the adjudication of objections to a creditor's claim against a debtor. Therefore, that case is inapposite.

Section 157(d) provides, in relevant part, that "[t]he district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States . . . " Congress enacted Section 157(d) as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, in response to the Court's decision in *Northern Pipeline*.

Since its enactment, this Court, the United States district courts and the courts of appeal have interpreted the jurisdictional grant set forth in the 1984 Bankruptcy Amendments expansively and, as a corollary, have sought to limit the "escape hatch" created by Section 157(d). *See, e.g. Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 569 (1985) ("this Court's holding in [Marathon] establishes only that Congress may not vest in a non-Article III court the power to adjudicate, render final judgment, and issue binding orders in a traditional contract action arising

under state law, without consent of the litigants and subject only to ordinary appellate review"); *In re Vicars Ins. Agency, Inc.*, 96 F.3d 949, 951-952 (7th Cir. 1996) ("courts have uniformly agreed that a narrow interpretation [of Section 157(d)] is required"); *Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.)*, 922 F.2d 984 (2d Cir. 1990), *cert. denied*, 502 U.S. 808 (1991) (same).

Circuit courts that have been presented with this issue agree that withdrawal of the reference pursuant to Section 157(d) is mandated only if the

> issues require the interpretation, as opposed to mere application, of the non-title 11 statue, or when the court must undertake analysis of significant open and unresolved issues regarding the non-title 11 law. The legal questions need not be of cosmic proportions, but must involve more than mere application of existing law to new facts.

*Vicars Ins. Agency*, 96 F.3d at 954. *See Ionosphere Clubs*, 922 F.2d at 995 (same); *Security Farms v. Int'l Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers*, 124 F.3d 999, 1008 and n. 4 (9th Cir. 1997) (withdrawal of the reference is mandatory in "cases requiring material consideration of non-bankruptcy federal law. . . By contrast, permissive withdrawal does not hinge on the presence of substantial and material questions of federal law").[7] Indeed,

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[7] Petitioners rely on statements by Representative Kastenmeier contained in the legislative history of Section 157(d) (reported at 130 Cong. Rec. H1850, daily ed. March 21, 1984). Pet. Br. at 16. Most courts have not accorded Rep. Kastenmeier's statements the weight ascribed to them by petitioners. *See In re Chadbourne Indus., Ltd.*, 100 B.R. 663, 666 (S.D.N.Y. 1989) (collecting cases). Other remarks by Rep. Kastenmeier also indicate that he intended Section 157(d) to be read narrowly. *See* S. Rep. No. 55, 98th Cong., 1st Sess. 16 (1983); *see also Vicars*, 96 F.3d at 952. In any event, in *U.S. v. Ron Pair, Inc.*, 489 U.S. 235, 240-241 (1989), this Court held with respect to the Bankruptcy Code

as one district court has said, "a literal reading of this statute would eviscerate much of the work of the bankruptcy courts." *In re Adelphi Inst., Inc.*, 112 B.R. 534, 536 (S.D.N.Y. 1990).

In this case, the District Court and Court of Appeals applied these well-settled principles to find that mandatory withdrawal was not appropriate under the facts of this case because resolution of Petitioners' claims did not require significant interpretation of non-bankruptcy law.[8] 3a. At least one other court also has held that adjudication of a creditor's ADEA claims did not require withdrawal of the reference under Section 157(d) for the same reason. *See Wittes v. Interco Inc. (In re Interco, Inc.)*, 137 B.R. 328, 329 (E.D. Mo. 1992); *see also In re Chadbourne Indus. Ltd.*, 100 B.R. 663, 667-669 (S.D.N.Y. 1989) (denying creditor's Section 157(d) motion in case involving determination as to whether trustee was a "successor employer" within the meaning of the NLRA).[9]

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that "it is not appropriate or realistic to expect Congress to have explained with particularity each step it took. Rather, as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute."

[8] Petitioners' claim that withdrawal of the reference pursuant to Section 157(d) was mandated because the Bankruptcy Court was required to decide a then unsettled issue of law relating to whether Kishbaugh ratified his otherwise invalid release by failing to tender back the consideration paid is unfounded. As is evident from the Merits Decision, the Bankruptcy Court did not disallow Kishbaugh's claim on this basis, but rather considered and rejected his claim on the merits. 77a-80a. Accordingly, the Court of Appeals correctly held that any error resulting from the Bankruptcy Court's consideration of this issue was harmless. 3a.

[9] Petitioners apparently seek to demonstrate the existence of a conflict in the courts' application of Section 157(d) to discrimination claims by citing *In re Bennett Paper Corp.*, 63 B.R. 8 (Bankr. E.D. Mo. 1985) and *In re Cache, Inc.*, 71 B.R. 851 (Bankr. S.D. Fla. 1987). However, neither of these courts actually applied the "substantial and material" consideration standard applied by the *Interco* court and by the

Given that the courts below simply applied well-settled precedent to the particular facts of this case, and that Petitioners have not demonstrated any basis to distinguish discrimination claims from the myriad of other claims as to which a creditor loses the right to a jury trial if he or she files a proof of claim,[10] there is no reason for this Court to grant certiorari to decide this issue.

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overwhelming majority of other courts considering motions for withdrawal of the reference pursuant to Section 157(d). In any event, only one circuit court, the Second Circuit below, has specifically considered the application of Section 157(d) to a discrimination claim. *See also Rhett v. Carnegie Center Assoc. (In re Carnegie Center Assoc.)*, 129 F.3d 290 (3d Cir. 1997) (Third Circuit affirmed bankruptcy court's adjudication of a creditor's pregnancy discrimination proof of claim without commenting on the applicability of Section 157(d)). Accordingly, the specific application of Section 157(d) to discrimination claims does not present an issue that is ripe for review by this Court. *See* Sup. Ct. R. 10.

[10] Petitioners' argument that withdrawal of the reference of their discrimination claims was required by the "personal injury tort" exemption set forth in 28 U.S.C. §157(b)(2)(B) and (b)(5) also fails. Petitioners have not cited any authority demonstrating a split in the application of this section to discrimination claims by the United States courts of appeal. Therefore, there is no reason for this Court to grant certiorari to resolve this issue.

Moreover, this Court previously has held that ADEA claims are not in the nature of personal injury claims. *See Commissioner v. Schleier*, 515 U.S. 323, 335-336 (1995) (back pay and liquidated damages awarded for an ADEA claim cannot be excluded from an individual's gross income under Section 104(a)(2) of the Internal Revenue Code because they are not based on tort or tort type rights and are not received "on account personal injuries or sickness). Likewise, at least one other court specifically has held that ADEA claims are not personal injury claims within the meaning of 28 U.S.C. §157(b)(2)(B) and (b)(5). *See Interco, Inc. v. Priest (In re Interco., Inc.)*, 135 B.R. 359, 362 (Bankr. E.D. Mo. 1991).

### C. There is No Basis for this Court to Review the Final Fee Order

Petitioners' final attempt to invoke the certiorari jurisdiction of this Court likewise fails to present any legal issue that satisfies the criteria set forth in Sup. Ct. R. 10. In an attempt to manufacture an issue worthy of review, petitioners posit the existence of a division of authority among the circuits concerning the disclosure required of professionals seeking to be retained by or on behalf of a debtor's estate.[11] However, a close analysis of their petition reveals that there is no such split of authority. Rather, petitioners are arguing that the reviewing courts misapplied the law to the facts presented.[12] Thus, despite the argument urged, Petitioners merely seek another review on the merits.[13]

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[11] Professionals seeking to be retained by or on behalf of a debtor's estate must submit an application for retention for the Bankruptcy Court's approval. *See* 11 U.S.C. §327 and Fed. R. Bank. P. 2014. In the application, the professional is required to disclose all of the professional's relationships with the "debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States Trustee or any person employed by the United States Trustee." *See* Fed. R. Bank. P. 2014(a).

[12] As stated above, the District Court and Court of Appeals reviewed the Bankruptcy Court's rejection of petitioners' objections to Debtors' Counsels' fee applications on the grounds of conflicts of interest and disinterestedness under the abuse of discretion standard. *See Electro-Wire Prods. v. Sirote & Permutt, P.C. (In re Prince)*, 40 F.3d 356, 359-60 (11th Cir. 1994); *Gray v. English*, 30 F.3d 319, 324 (10th Cir. 1994). The District Court and Court of Appeals likewise reviewed the Bankruptcy Court's award of fees and expenses to Debtors' Counsel under the abuse of discretion standard. *In re Arlen's Dep't Stores, Inc.*, 615 F.2d 925, 943 (2d Cir. 1979); *In re Nine Assocs. Inc.*, 76 B.R. 943, 945 (S.D.N.Y. 1987).

[13] In any event, it is clear that the decisions of the Bankruptcy Court, District Court and Court of Appeals were correct on the merits. As the Bankruptcy Court correctly noted in its decision authorizing the Debtors to retain MW&E, there is no *per se* rule that prohibits a debtor's counsel

Even if Petitioners had presented proper legal issues for this Court's review, the issues they raise were not preserved in their appeals below. Indeed, all of the purported "conflicts" and disclosure objections issues were considered and overruled by the Bankruptcy Court in earlier decisions, from which Petitioners did not appeal.[14] Accordingly, the Court of Appeals correctly held that Petitioners were precluded from relitigating those issues by the doctrines of law of the case and collateral estoppel. *See Christiansen v. Colt Indus. Operating Co.*, 486 U.S. 800, 815-16 (1988); *Central Hudson Gas & Electric Corporation v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 368 (2d Cir. 1995).

Finally, Petitioners' attempt to create an issue for certiorari by arguing that the reason Leslie Fay filed objections to their proofs of claim in the Bankruptcy Court was to undermine Petitioners' jury trial rights is frivolous. As a debtor-in-possession, Leslie Fay and its Counsels were obligated to investigate the validity of every claim filed

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from *simultaneously* representing a corporate debtor and its principals. *See also In re FSC Corp.*, 33 B.R. 212, 213 (Bankr. W.D. Pa. 1983) (court determined that no conflict existed on the part of a law firm that represented both a corporate debtor and its officers); *In re Roberts*, 75 B.R. 402, 403 (D. Utah 1987) (same); *In re O'Connor*, 52 B.R. 892 (Bankr. D. Okla. 1985); *In re Howell*, 148 B.R. 269, 270 (Bankr. S.D. Tex. 1992) (same). Accordingly, the mere fact that Debtors' Counsel represented certain of Leslie Fay's officers and directors in other or related proceedings does not present a *per se* or disabling conflict that would have warranted their disqualification.

[14] Specifically, the Bankruptcy Court fully adjudicated the issues raised by the United States Trustee relating to WG&M's failure to fully disclose certain relationships in its application for retention. In that regard, the Bankruptcy Court ordered WG&M to disgorge approximately $1 million in legal fees and expenses it previously had been paid and limited the role of WG&M in Leslie Fay's bankruptcy proceedings. Petitioners' attempt to invoke certiorari on this issue is nothing more than an improper invitation to this Court to impose additional sanctions upon WG&M where there is no legal issue to be considered. Petitioners' invitation should be declined.

against the estate and to object to claims that lacked merit. Petitioners' effort to characterize these routine employment disputes as animated by bad faith or any improper purpose was specifically rejected by the courts below and again fails to present a legal issue for this Court to consider.

## Conclusion

For all of the foregoing reasons, this Court should deny the petition for certiorari in all respects.

Dated: New York, New York
November 30, 1999

Respectfully submitted,

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No. 99-548

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IN THE

# Supreme Court of the United States

In Re: THE LESLIE FAY COMPANIES, INC.,

*Debtors.*

JACOB V. FALBAUM, ANTHONY GILL, LEE L. KISHBAUGH, EMILE LEWKOWIEZ, ELIZABETH MICHAUD and RAYMOND J. TERWILLIGER,

*Petitioners,*

—v.—

THE LESLIE FAY COMPANIES, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## REPLY BRIEF

## IMPORTANT ISSUES WARRANT REVIEW AS RESPONDENTS' BRIEF ITSELF DEMONSTRATES

The principal contention of respondents, that no issues warrant review by this Court, is refuted by the cases cited in respondents' brief in opposition ("Br. Opp.").

Jury trial rights pursuant to the combined effect of the federal anti-discrimination statutes and 28 U.S.C. § 157(d) were not even tangentially involved and the cases mistakenly relied upon at pages 12 and 14 of respondents' brief.

Moreover, in Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989), relied upon by respondents (Br. Opp. p. 12), Katchen v. Landy, 382 U.S. 323 (1966), is distinguished as not dependent upon the status of bankruptcy courts as courts of equity (492 U.S. at 57), but instead as requiring an analysis of the nature of the claim involved. (492 U.S. at 61)

In Granfinanciera, petitioner's jury trial rights were given effect even though the case, as herein, had been designated as one involving a "core" bankruptcy proceeding.

Granfinanciera stresses that jury trial rights derived from the Seventh Amendment cannot be eliminated merely by the relabeling of a cause of action and placing exclusive jurisdiction over it in "a specialized court of equity" (492 U.S. at 61), such as the bankruptcy court.

A basic difference between the instant case and

Katchen v. Landy is that the latter case was decided under the long since outmoded and discarded Bankruptcy Act of 1898, 30 Stat. 544 (382 U.S. at 327), but nevertheless relied upon by respondents and the courts below (Br. Opp. p. 11, fn. 4).

The ADEA of 1967 had not been enacted when Katchen v. Landy was decided. Age discrimination claims by former employees were never considered part of the traditional jurisdiction of bankruptcy courts. The long-established exercise of summary jurisdiction by bankruptcy courts for the recovery of property belonging to the estate as a result of voidable preferences that was involved in Katchen v. Landy therefore is inapplicable.

Further, the 1966 decision in Katchen v. Landy preceded the seminal decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

In addition, in 28 U.S.C. § 157(d), Congress has subsequently declared such claims to be mandatorily withdrawable to the district courts from the bankruptcy courts. 28 U.S. § 157(d) was not enacted until 1984, as part of the Bankruptcy Amendments and Federal Judgeship Act.

Under 28 U.S.C. § 157(d), removal or withdrawal of such discrimination claims to an Article III district court is mandated because their resolution would require "consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce."

Such "other laws" include statutes such as the Age Discrimination in Employment Act, 29 U.S.C. § 626(e) ("ADEA").[1]

Under the ADEA, a person with a claim thereunder is ". . . entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action." (29 U.S.C. § 626(c); emphasis added.)

This specific statutory language renders circular the contention of respondents that petitioners forfeited their jury trial rights by filing claims in the bankruptcy court because of the equitable nature of such proceedings. (Br. Opp. p. 11) The filing of such claims necessarily was subject to the mandatory withdrawal provisions of 28 U.S.C. § 157(d), as well as the guarantee of jury trial rights in the ADEA. Petitioners therefore were entitled to rely upon the belief that this statutory mandate would be given effect when the proofs of claims were filed.

Application of Katchen v. Landy, supra, is further barred by the proviso in the ADEA requiring jury trial rights to be made available "regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c).

Because of this precise statutory language, Lytle

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[1] The statutory provisions involved are cited and quoted at pages 14 and 15 of the petition herein, and in the appendix at A 4 and A 17-20.

v. Household Manufacturing, Inc., 494 U.S. 545 (1990), is directly applicable. Under it the legal issues are required to be tried before a jury first in an Article III court notwithstanding the concurrent request for equitable relief.

Langenkamp v. Culp, 498 U.S. 42 (1990), cited in respondents' brief in opposition at p. 12, is similarly indicative of the importance of the issues presented for review because it also did not involve consideration or application of the mandatory withdrawal provisions of 28 U.S.C. § 157(d).

Another case relied upon by respondents (Br. Opp. pp. 14-15), Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985), also is indicative of the importance of the review of the questions presented. Like Granfinanciera and Langenkamp, Thomas involved neither 28 U.S.C. § 157(d) nor the ADEA. Moreover, omitted from respondents' brief is the pertinent quotation from the opinion in that case (which the brief in opposition wrongly cites at page 14 as appearing in 473 U.S. at 569, instead of at 584) observing that in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), "a divided court was unable to agree on the precise scope and nature of Article III's limitations."

Although 28 U.S.C. § 157(d) was enacted to implement the decision in Northern Pipeline, its applicability has never received consideration by this Court in the context of the jury trial rights that are specifically guaranteed by the federal anti-discrimination statutes.

Also supporting the importance of the issues that the petition presents for review are the decisions that respondents cite from Circuit Courts of Appeals. (Br. Opp. p. 15) Matter of Vicars Ins. Agency, Inc., 96 F. 3d 949, 954 (7th Cir. 1996), a case involving RICO. In Matter of Vicars, the court indicates that mandatory withdrawal apparently would be called for under the decisions when, as shown in the petition herein, "the proceeding presented a conflict between statutes, a question of first impression, or a constitutional challenge." (96 F. 3d at 953)

Shugrue v. Air Line Pilots Ass'n, Int'l (In re Ionosphere Clubs, Inc.), 922 F. 2d 984 (2d Cir. 1990), cert. denied, 502 U.S. 808 (1991) (Br. Opp. p. 15), similarly does not involve consideration of the jury trial guarantee found in the ADEA, and emphasizes that withdrawal from the jurisdiction of the bankruptcy court is necessary when cases such as the instant case, necessarily involve "substantial and material consideration of non-Bankruptcy Code federal statutes. . . ." (922 F.2d at 995)

## REVIEW IS WARRANTED BY THE CATCH-22 SITUATION IN WHICH PETITIONERS WERE PLACED

Painfully apparent is the fallacy of respondents' central premise that petitioners had "voluntarily" agreed to the bankruptcy court's jurisdiction by filing a proof of claim (Br. Opp. p. 11).

A Catch-22 situation faced the petitioners. In order to assert their discrimination claims against their former employer, as required by the federal

discrimination laws, it was necessary for them to file such claims in the bankruptcy court. However, because the former employer itself had first invoked the jurisdiction of the bankruptcy court, and thereby received an automatic stay on the institution of other judicial proceedings, petitioners had no choice in the matter. Moreover, the time within which such claims could be asserted in court was rapidly expiring.

Petitioners "voluntarily" agreed to nothing; when they filed their proofs of claims in the bankruptcy court, they did so because they had to in order to protect their interests.

To treat what had to be done to preserve the existence of such claims as a voluntary waiver of the jury trial rights that are an intrinsic part of them is contrary to the long-standing principle that because "the right of jury trial is fundamental, courts indulge every reasonable presumption against waiver," as stated in Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

Petitioners were not responsible for causing the bankruptcy proceeding; they were victims of it. As the bankruptcy court found, the bankruptcy proceeding was "unusual in that it was a direct consequence of fraud that had been perpetrated against the company, its shareholders, and creditors." In re Leslie Fay Cos., Inc., 175 B.R. 525, 533 (S.D.N.Y. 1994).

Respondents also mislead in asserting that the abrogation of petitioners' rights by determination of their claims in bankruptcy court proceedings instead of before a jury in an Article III court is needed for "the

orderly administration of bankruptcy estates. . . ." (Br. Opp. p. 11, fn. 4)

The fallacy of this contention is exposed by the next footnote in respondents' brief in which they concede that ordinary personal injury negligence claims and wrongful death claims are not required to be determined in bankruptcy courts but in Article III district courts before juries. (Br. Opp. p. 11, fn. 5)

Since the determination of ordinary personal injury actions arising under states law does not need to made by bankruptcy courts in order to facilitate "the orderly administration of bankruptcy estates," the illogic of contending that discrimination claims entitled to jury trials under federal statutes and the Seventh Amendment are required to be treated differently from ordinary negligence actions is manifestly worthy of this Court's attention.

Respondents assert that there is no basis to distinguish discrimination claims from the "myriad of other claims as to which a creditor loses the right to jury trial if he or she files a proof of claim." (Br. Opp. p. 17) In footnote 10, however, respondents impliedly admit the error of their statement regarding the "myriad of other claims" by acknowledging that even with regard to ordinary "personal injury tort" claims, the filing of a proof of claim does not cause creditors to lose the right to jury trial in a constitutional court. (Br. Opp. p. 17)

The anomaly under which even ordinary state law negligence claims are entitled to be determined by constitutional courts before juries, notwithstanding the

filing of proofs of claims by the plaintiffs, but not discrimination cases arising under federal statutes, even though the federal statutes explicitly so provide, should be addressed, particularly in view of the constitutional dimensions of the issue under the Seventh Amendment.

REVIEW IS ESPECIALLY IMPORTANT IN VIEW OF THE CONFLICT OF INTEREST ISSUES

United States v. Gellene, 182 F.3d 578 (7th Cir. 1999), illustrates a drastic difference in the attitude toward the issue of the non-disclosure of conflicting interests by attorneys.

A footnote in the Gellene opinion indicates that, according to the bankruptcy court, "New York is different from Milwaukee [where] . . . . Professional things like concepts [of interest] are taken very, very seriously. (182 F.3d at 583, fn. 4)

A perjury conviction involving non-disclosures of conflicting interests of a prominent New York law firm, Milbank Tweed, was affirmed in the Gellene case, and the law firm also was required to disgorge the $1.8 million in fees that it had received to the bankruptcy estate. (Gellene, fn. 9)

The Seventh Circuit's careful analysis of such issues compared with the cursory non-citable summary order written by a "Deputy Clerk" for an "Acting Clerk" generated by the Second Circuit in the instant case is indicative of a marked disparity in the treatment of such issues. (1a-4a)

The Gellene opinion also rejects the narrow view on materiality expressed in Collier on Bankruptcy, stating that, "We have no doubt that a misstatement in a Rule 2014 statement by an attorney about other affiliations constitutes a material misstatement. * * * This requirement goes to the heart of the administration of the bankruptcy estate." (182 F.3d at 588)

Non-compliance with the disclosure requirements and multiple conflicts of interest by the attorneys representing the debtors herein is clear as the United States Trustee found. (177a-179a) Moreover, respondents' assertion that "there is no *per se* rule that prohibits a debtor's counsel from *simultaneously* representing a corporate debtor and its principals" as contended by respondents (Br. Opp. p. 18, fn. 13) is flatly contrary both to the Seventh Circuit's decision in Gellene and to the applicable ethics requirements of New York law as well. See Chang v. Chang, 190 A.D.2d 311, 597 N.Y.S.2d 692, 697 (1st Dep't 1993).

Consideration of the conflict of interest issues presented is of particular importance in view of the findings that the same attorneys were involved in a continuing attempt to conceal the evidence of the pervasive pattern of fraudulent conduct that admittedly perpetrated by clients of the law firms involved that was root cause of this bankruptcy proceeding in the first place as shown by In re the Leslie Fay Cos., Inc. Sec. Litig., 161 F.R.D. 274, 280-81 (S.D.N.Y. 1995).

Such conduct also characterized the self-dealing of management during the bankruptcy proceeding when in the Pomerantz-dominated management of Leslie

Fay, acting under the supervision of its attorneys, approved the payment of $1,069,579.22 to Laura Pomerantz in consideration of a release of a fraudulent age discrimination claim that Mrs. Pomerantz, the terminated wife of the Chairman of the Board, admitted to be non-existent. This occurred at the same time when huge amounts of attorneys' fees were being paid to the same conflicted lawyers to facilitate a strategy intended to deprive petitioners of their constitutional and statutory jury trial rights for the determination of their own discrimination claims. (TR 5/29/97 at pp. 397-400; TR 6/16/97 at pp. 629-631, Exh. L.)

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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